TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 208.

J. Frank Clinch,

RECEIVER OF THE FIDELITY NATIONAL BANK OF CINCINNATI, OHIO, APPELLANT,

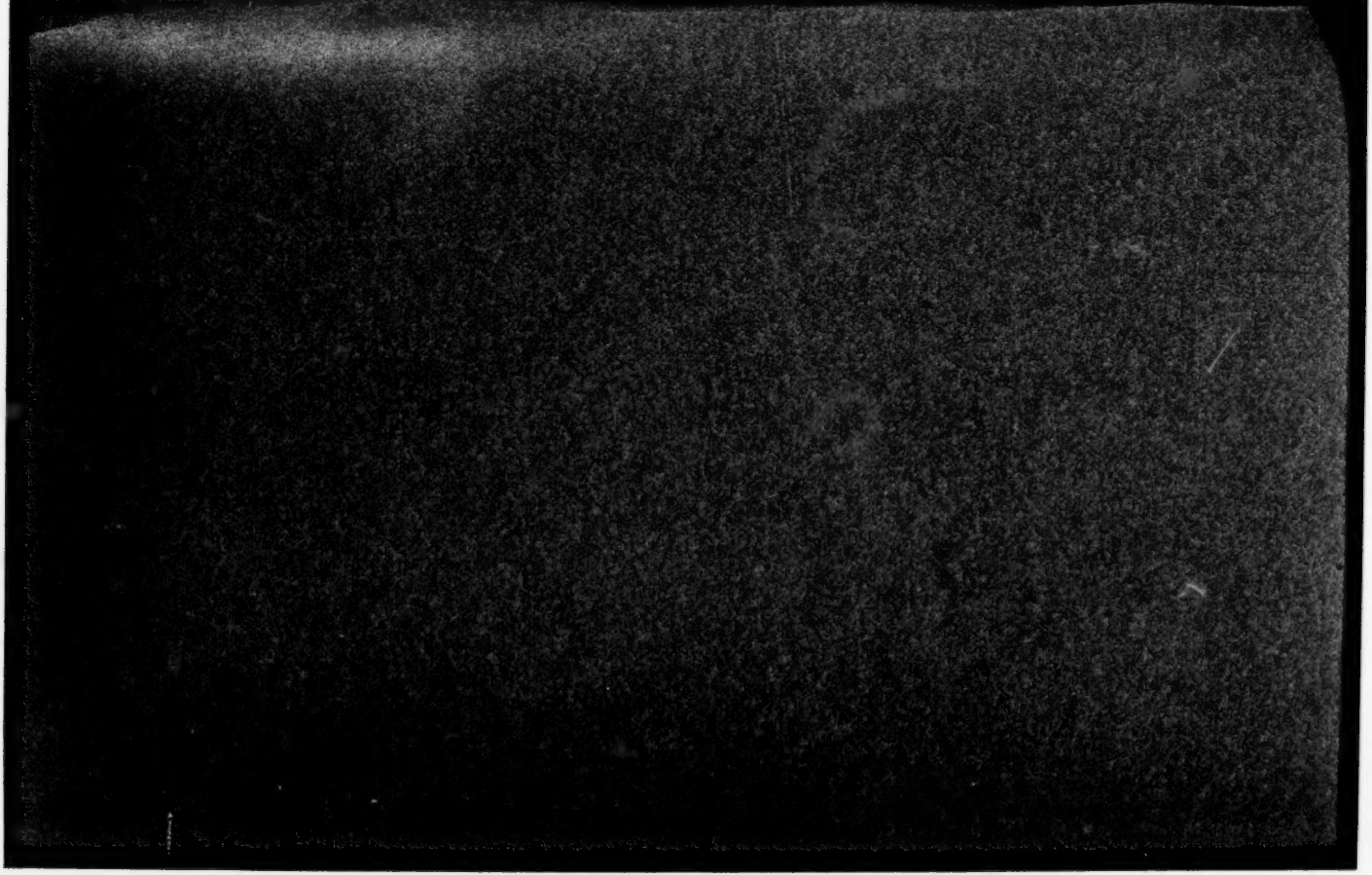
vs.

THE CHEMICAL NATIONAL BANK OF NEW YORK.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED APRIL 23, 1895.

(16,849.)



(16,849.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 279.

DAVID ARMSTRONG, RECEIVER OF THE FIDELITY NATIONAL BANK OF CINCINNATI, OHIO, APPELLANT,

vs.

THE CHEMICAL NATIONAL BANK OF NEW YORK.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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1 *Transcript of Record.*

United States Circuit Court of Appeals for the Sixth Circuit.

DAVID ARMSTRONG, Receiver of the Fidelity National Bank, Appellant,
vs.
THE CHEMICAL NATIONAL BANK, Appellee.
No. 473.

Stipulation as to Printing Record.

The clerk will please print the record in this cause, including this stipulation, but omitting:

1st. The subpœna and the return thereof, as found on pages 9 and 10 of the record.

2nd. Exhibit 3, Quinlan's deposition, found on pages 30 to 33, inclusive.

3rd. Exhibit 6, Quinlan's deposition, as found on pages 38 and 39.

4th. Armstrong's Exhibit No. 6, as found on pages 150, 151 and 152.

5th. Watters' Exhibit 8, as found on pages 164 to 168, inclusive.

6th. Watters' Exhibit 10, as found on pages 171 to 192.

7th. Watters' Exhibit 9, as found on pages 169 and 170.

8th. Notices to take depositions and acknowledgment of the same, as found on pages 27, 81, 102, 223 and 224.

9th. Judge Sage's first opinion, as found on pages 194 to 210.

10th. The first decree below, as found on pages 212 to 214, inclusive.

11th. Assignment of error, as found on pages 214 to 216.

12th The appeal bond given after the first decree, found on pages 217 and 219.

And in place of each of the above items Nos. 2, 3, 4, 5, 6 and 7, he will, in printing, insert in the record where said exhibits would be found, if they were printed in the record in full, the memoranda relating to such exhibits given him herewith.

2 And it is agreed that with the permission of the court either party may, on argument, refer to or quote from any of the accounts not printed in full, should such course seem advisable for furnishing more exact information.

JOHN W. HERRON,
Counsel for Appellant.
WM. WORTHINGTON,
Counsel for Appellee.

No. 473. Stipulation for printing record. Filed Feb. 12, 1897. Frank O. Loveland, clerk.

THE UNITED STATES OF AMERICA, *Southern District of Ohio, Western Division,* } *ss:*

At a stated term of the circuit court of the United States of America, within and for the western division of the southern dis-

trict of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms at the city of Cincinnati, Ohio, in said district, on the first Tuesday of October, being also the 6th day of that month, in the year of our Lord one thousand eight hundred and ninety-six, and of the American Independence the one hundred and twentieth—present, the Honorable George R. Sage, district judge—among the proceedings had were the following, to wit:

THE CHEMICAL NATIONAL BANK, Complainant,
vs.
DAVID ARMSTRONG, as Receiver of the Fidelity National Bank, Defendant. } In Equity.

Be it remembered that heretofore, to wit, on the 10th day of May, A. D. 1890, came the complainant, The Chemical National Bank, and filed in the clerk's office of said court its certain bill of complaint against the defendant herein; said bill of complaint is clothed in the words and figures following, to wit:

3 *Bill of Complaint.*

Circuit Court of the United States in and for the Southern District of Ohio, Western Division.

THE CHEMICAL NATIONAL BANK
vs.
DAVID ARMSTRONG, as Receiver of the Fidelity National Bank.

To the judges of the circuit court of the United States for the southern district of Ohio, western division:

The Chemical National Bank of the City and State of New York brings this its bill of complaint against David Armstrong, a citizen of the State of Ohio, as receiver of the Fidelity national bank, formerly of the city of Cincinnati and State of Ohio, and thereupon your orator complains and says:

For a long time prior to the first day of January, A. D. 1887, your orator, The Chemical National Bank, aforesaid, was, and since said last-named day, has been, and now is, a corporation duly incorporated as a national banking corporation or banking association, situate in the city of New York, State of New York, under and by virtue of the banking acts of the United States authorizing the formation of national banking associations, and that from the date of its incorporation, and at the dates and times herein mentioned, the said Chemical national bank, being thereunto authorized by said acts, transacted and at the present time continue to transact a banking business in the city of New York.

That a long time prior to the first day of January last named, the Fidelity national bank was duly incorporated and became a body corporate as a national banking corporation or banking association, situate in the city of Cincinnati and State of Ohio, under and by

virtue of said banking act, and that from the date of its incorporation up to the 18th day of June, A. D. 1887, the said Fidelity national bank, being thereunto authorized by said acts, transacted and continued to transact a banking business in the said city of Cincinnati.

That on, to wit, the second day of March, 1887, the said Chemical national bank at the special instance and request of the said Fidelity national bank loaned to said Fidelity national bank the sum of three hundred thousand dollars ($300,000.00), which said sum said Fidelity national bank promised and agreed to repay to said
4 Chemical national bank on demand, with interest thereon from the date of said loan. And at the same time said Fidelity national bank deliver- to said Chemical national bank as an inducement to it to make said loan, and as security therefor, its certificate of deposit No. 345, which certificate of deposit, together with the endorsements then made thereon, was in the words and figures, as follows, to wit:

Certificate of Deposit.

This certificate is not subject to check, but must be presented to draw the money. No. 345.

The Fidelity National Bank.

CINCINNATI, *Feb.* 28, 1887.

E. L. Harper has deposited in this bank three hundred thousand dollars ($300,000.00), payable to the order of himself on return of this certificate in current funds.

AMMI BALDWIN, *Cashier.*

$300,000.00.
Endorsed: "E. L. Harper."

At the time said certificate was issued, and when the same was delivered to your orator, said Ammi Baldwin was the cashier of said Fidelity national bank, and his signature, as made to said certificate of deposit, was used as the signature of said Fidelity national bank by the authority of said last-named bank.

And at the same time, to wit, on the said second day of March, said Fidelity national bank delivered to said Chemical national bank, as collateral security for said loan, sundry promissory notes of the aggregate face value of $326,695.30.

Afterwards, on or about the twenty-first day of May, A. D. 1887, at the special instance and request of said Fidelity national bank, said Chemical national bank returned to said Fidelity national bank certain of the promissory notes delivered to said Chemical national bank as collateral security, as aforesaid, and received therefor certain other promissory notes in substitution for the notes so returned, so that upon the making of said exchange and substitution the Chemical national bank was the owner and holder of the promissory notes set forth and described in the schedule hereto attached, marked "Exhibit A," which schedule is hereby made part

of this bill of complaint as collateral security for the payment of said loan made upon the second day of March, A. D.,
5 1887, and said Chemical national bank has since continued to be, and is now the owner and holder of said notes set forth in said "Exhibit A," except in so far as the same have been paid to said Chemical national bank by the persons indebted thereon, as follows, that is to say, three of the notes of J. W. Wilshire, for the sum of $25,000 each, one becoming due upon the 28th day of July, 1887, one becoming due upon the 29th day of August, 1887, and one becoming due upon the 1st day of October, 1887, were paid at maturity thereof by John V. Lewis, who was the endorser thereon; and said Chemical national bank, since the payments so as aforesaid has held the money so received as collateral security for said loan of March 2, 1887, in lieu of the notes so paid.

That on the twenty-first day of June A. D. 1887, the Comptroller of the Currency, having become satisfied as specified in said banking acts of the United States that the said Fidelity national bank was insolvent, did on that day appoint the defendant, David Armstrong, receiver of the said bank, as provided in section 2234, of the Revised Statutes of the United States, and said defendant, duly qualified as such receiver under such appointment and entered upon the performance of, and has ever since performed, and is now performing, the duties of receiver, aforesaid.

That on the twelfth day of July, 1887, upon information theretofore duly filed in the circuit court of the United States for the southern district of Ohio, western division, such proceedings were had upon due notice to the Fidelity national bank, that a decree and order was duly entered in said court whereby, among other things, it was adjudged and decreed that all the rights, privileges and franchises of said association the Fidelity national bank were forfeited, and said association declared, adjudged and decreed to be dissolved.

Your orator further is informed and believes, and therefore avers the fact to be, that no one of the promissory notes set forth and described in said "Exhibit A," was at the time the same were respectively delivered to said Chemical national bank, as collateral security, as aforesaid, or at any time afterwards, part of the assets and property of said Fidelity national bank.

Your orator further states that said Fidelity national bank never repaid to your orator the sum of money loaned by your orator to said Fidelity national bank on the second day of March, A. D. 1887, as aforesaid nor any part thereof.

Your orator further states that it has presented to said defendant, as receiver as aforesaid proof of the indebtedness of said Fidel-
6 ity national bank, to your orator upon the loan made by your orator to said Fidelity national bank, as aforesaid, and has requested said defendant, as such receiver, to submit such proof to the Comptroller of the Currency, to the end that your orator may be admitted to be a creditor of the Fidelity national bank in the sum of $300,000.00 with interest thereon from the second of March, A. D. 1887, said sum, with interest, being the amount due upon said loan at the

time of the appointment of said receiver; and to the end that a dividend may be made and paid to your orator upon said claim from the assets of said Fidelity national bank in the hands of said defendant, as such receiver, equal in ratio to the dividends heretofore paid by said comptroller and said defendant, as such receiver, to other creditors of said Fidelity national bank, and that your orator might thereafter receive such further dividends upon said sum as might be made by said comptroller upon the claims of the creditors of said bank until the claim of your orator from said dividends and from the proceeds of the promissory notes set forth in said "Exhibit A" should be paid in full. But said defendant and said Comptroller of the Currency have refused and still do refuse to admit and allow the claim of your orator, as aforesaid, and refuse to enroll your orator, as one of the creditors of said Fidelity national bank, and to pay to it the dividends heretofore ordered paid to the creditors of said Fidelity national bank, and still do so refuse; and this, although said comptroller now has in his possession large sums of money, the proceeds of the assets of said Fidelity national bank, collected by said receiver, and said receiver has in his possession assets of said Fidelity national bank of great value.

And your orator states that heretofore said Comptroller of the Currency has made ratable dividends from the moneys collected from the assets of said Fidelity national bank on the claims proved or adjudicated against said bank, and by said defendant as receiver has paid such dividends to said creditors. The exact amounts of said dividends and when they were declared and paid your orator is unable to state. But upon information and belief it avers that the same are of a large amount, to wit, at least the sum of thirty-five (35) per cent. upon the claims so allowed or adjudicated. And said comptroller will hereafter declare other dividends and will through said defendants, as such receiver, pay the same to other creditors of said Fidelity national bank to the exclusion of your orator, unless prevented by this court.

All of which action by said Comptroller of the Currency and by said defendant, as such receiver, being contrary to equity
7 and good conscience and tending to the manifest wrong and injury of your orator and for as much as your orator has no adequate remedy in the premises at or by the strict rules of the common law, and is only relievable in a court of equity where matters of this nature are properly cognizable and relievable, to the end therefore that said defendant, as such receiver, may, if he can, show cause why your orator should not have the relief hereby prayed for, and may full, true, and perfect answer make (oath being waived) to all and singular the matters and charges aforesaid, and that the amount due to your orator upon its loan to said Fidelity national bank made on the second day of March, A. D. 1887, may be ascertained and a decree be entered adjudging that your orator is a creditor of said Fidelity national bank in the sum so found due, and is entitled to receive the dividends ratable with the other creditors of said bank which have heretofore been made and paid to such other creditors, with interest thereon from the time the same

were ordered paid, and also such further ratable dividends as may hereafter be ordered to be paid to the creditors of said Fidelity national bank until from such dividends and from the proceeds of the notes set forth in said "Exhibit A," the claim due to your orator is fully paid, and that your orator may have such further order and relief in the premises as may be equitable and just. May it please your honors to grant unto your orator the writ of subpœna issuing out of and under the seal of your honorable court to be directed to said David Armstrong, as receiver of the Fidelity national bank, by a certain day and under a certain penalty therein to be inserted, to be and appear before this court, and then and there to answer all and singular the premises, and further to stand and abide such order and decree herein as shall be agreeable to equity and good conscience. And your orator will ever pray.

WM. WORTHINGTON,
Solicitor and Counsel for Complainant.

EXHIBIT A.

Note of	J. W. Wilshire,	due June 28, 1887..	$25,000 00
"	" "	July 28, " ..	25,000 00
"	" "	Aug. 28, " ..	25,000 00
"	" "	Oct. 1, " ..	25,000 00
"	" Champion Machine Co.	July 24, " ..	4,500 00
"	" "	July 28, " ..	5,200 00
8			
"	" "	Aug. 3, " ..	5,000 00
"	" "	Aug. 20, " ..	4,500 00
"	" Swift's iron & steel works	Sept. 16, " ..	25,000 00
"	" "	Sept. 21, " ..	25,000 00
"	" Riverside iron & steel w'ks	Sept. 28, " ..	15,386 35
"	" "	Oct. 8, " ..	15,386 35
"	" Whitley, Fassler & Kelly	Oct. 4, " ..	4,633 07
"	" "	Oct. 5, " ..	5,370 04
"	" "	Oct. 13, " ..	5,640 00
"	" "	Oct. 23, " ..	5,608 09
"	" "	Nov. 4, " ..	5,343 00
"	" "	Nov. 5, " ..	4,000 00
"	" "	Nov. 13, " ..	5,872 00
"	" "	Nov. 19, " ..	5,209 20
"	" "	Dec. 4, " ..	3,892 10
"	" "	Dec. 5, " ..	4,890 10
"	" "	Dec. 13, " ..	5,710 52
"	" "	Dec. 19, " ..	5,178 40
"	" "	Dec. 23, " ..	4,413 17
"	" "	Jan. 5, 1888..	4,450 00
"	" "	Jan. 13, " ..	4,200 00
"	" H. S. Bundy, payable on demand		50,000 00

This note of Bundy was secured by $100,000 Latrobe Coal & Iron Co. bonds.

And afterwards, to wit, on the 10th day of May, there was issued out of the clerk's office of the court aforesaid our certain subpœna in chancery, directed to the marshal of the district and against the defendant herein, said subpœna is clothed in the words and figures following, to wit:

And afterwards, to wit, on the seventh day of August, A. D. 1890, the following answer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Answer.

Circuit Court of the United States, Southern District of Ohio, Western Division.

THE CHEMICAL NATIONAL BANK }
vs.
DAVID ARMSTRONG, Receiver, etc. }

The answer of David Armstrong, receiver, to the bill of complaint filed in this case by the complainant.

9 And now comes the said David Armstrong, as receiver of the Fidelity National Bank of Cincinnati, Ohio, and for answer to the several matter set forth in the bill of complaint filed in this cause, or to so much thereof as he is advised that it is material or necessary for him to answer, says:

He admits that the complainant is a corporation organized and doing business as set forth in the said bill of complaint.

He admits that the Fidelity National Bank of Cincinnati was organized and did business as set forth in said bill, and that on the twenty-first day of June, 1887, the Comptroller of the Currency found that the said Fidelity national bank was insolvent, and on the twenty-seventh day of June, 1887, appointed this defendant receiver of the same; and defendant accepted the said appointment, and has duly qualified as such receiver, and has continued to act as such since that date, and is still so acting.

He admits that on the twelfth day of July, 1887, by decree of the circuit court of the United States for the southern district of Ohio all the rights, privileges and franchises of said association were forfeited, and the same was dissolved.

And the said defendant, further answering, says that it is true that on the second day of March, 1887, Ammi Baldwin was the cashier of the said Fidelity national bank and authorized to perform all the duties usually performed by such an officer. He also states that at the same time Edward L. Harper was the vice-president of the said bank and was the general manager of its affairs.

Defendant is unable to state from personal knowledge or from the records of said bank whether or not the said plaintiff on the date aforesaid loaned to the said Fidelity national bank the sum of three hundred thousand ($300,000) dollars on the faith and credit of the alleged certificate of deposit described in said bill; but he does aver

from information and belief that at said date said Edward L. Harper was engaged in large speculations on his own account, and in such speculations was using the funds of said bank and did so use said funds to a very large amount; and so as in the end, to cause the failure of said bank; that in such use of the funds of said bank he was assisted by said Baldwin as cashier, but that such use was not known to the other directors of said bank, and was not, in fact, authorized by its officers, and was fraudulent.

This defendant further avers from information and belief that said certificate of deposit described in said bill of complaint was fraudulently and without any consideration whatever, signed by said Baldwin; that said Harper had not deposited said $300,000.00, or any other sum in said bank as the basis of said certificate; nor had he said sum at that date on deposit in said bank; that said alleged certificate of deposit was not entered on the books of said bank; nor was the issuing of it known to, or authorized by the directors of said bank; that the proceeds obtained on the same were not received by the said bank, but were fraudulently appropriated by the said Harper to his own use.

This defendant, therefore, avers that the said certificate of deposit should be paid by said Harper, and that if by reason of any facts existing at the time same was taken by plaintiff, or that the plaintiff believed the same to be properly issued by the said bank, the said Fidelity national bank became liable to plaintiff thereon, it is only liable thereon as surety for said Harper, and is entitled to all the rights and privileges of a surety in any proceedings instituted for its collection.

This defendant further answering, says, and avers from information and belief, that said Harper at the time when said certificate was forwarded to plaintiff, also forwarded to it the said promissory notes as set forth in said petition; that certain substitutions were subsequently made by him in said security and that at the time of the failure of the said Fidelity national bank, the plaintiff held the promissory notes, a list of which is as given in the schedule attached to the bill of complaint. That three of said notes made by J. W. Wilshire, and endorsed by J. V. Lewis, for the sum of twenty-five thousand dollars each, were paid at maturity by said J. V. Lewis attested in said bill of complaint. The fourth note of said J. V. Lewis, also endorsed by said J. V. Lewis, for a like amount, payable June 28, 1887, was not presented at its maturity by the plaintiff; and by reason of plaintiff's failure to present the same for payment, the same was not paid by said J. V. Lewis, who was the endorser thereon. That said J. V. Lewis was entirely solvent, but claims to have been released from his liability thereon by reason of the said note not being presented for payment at its maturity, and notice not being given to him of its non-payment.

And this defendant avers that plaintiff did not receive payment of said note, solely by reason of its negligence in not presenting said note for payment at its maturity, and giving the proper notice to said endorser.

11 This defendant further avers that the said plaintiff in addition to the sums received as hereinbefore stated, has also received on the collateral forwarded to it by said Harper, the following: That upon the notes of the Champion Machine Co., described in the said schedule attached to the bill, the sum of $4,481.49 in cash, and the bonds of the Champion Machine Company to the amount of $5,800, and the bonds of Whitely, Fassler & Kelly, secured by mortgage, to the amount of $9,600.

Defendant avers that the plaintiff on the payments of each of said promissory notes of $25,000 each, as hereinbefore set forth, credited the same on the said alleged loan of $300,000, and reported them to this defendant as payments on that account, and treated said payments in all respects as proper credits on the amounts so claimed to be due from said Fidelity national bank.

Defendant, therefore, avers that he is entitled to require that all of the said payments, and also the amount of the $25,000 note due June 28, 1887, should be credited on the sum claimed to be due from the said Fidelity national bank; and that said plaintiff is not in any event entitled to prove as a valid claim against the trust represented by this defendant a larger sum than the amount of said alleged loan, after deducting all of said payments and the amount of said $25,000 note.

And that whenever subsequent sums are collected by said plaintiff from said collateral, this defendant will be entitled to recover back from it the same percentage on the amount so collected as the plaintiff has received in dividends at said date.

And defendant further avers that said collateral notes of the Champion Machine Company, belonged to the Fidelity national bank, and the others were in equity the property of the said Fidelity national bank at the time when the same were forwarded by said Harper to the plaintiff; that said notes were claimed by said Harper to be discounted by him for the makers or endorsers of the same, but such claim was fraudulent on the part of said Harper; that the money paid to the said makers or endorsers on the said promissory notes by said Harper, was the money of the Fidelity national bank, used by him without authority; and that, therefore, the said bank was in equity the owner of said promissory notes.

Defendant further says that said plaintiff presented to him as receiver the claim now sued upon, on the twenty-fifth day of April, 1890, but such claim was never presented to him or any demand made of him for the allowance of the same until said date; that this defendant then refused to allow said claim for the full amount, but did, in writing, offer to admit, and to pay dividends on

12 the sum of two hundred thousand ($200,000) dollars, that being about the amount which this defendant believed to be due after making the credits to which he claims he was justly entitled to as set forth in this answer; and to pay said dividend and allow said sum without prejudice to the right of plaintiff to sue for the balance of said claim, which offer was refused by the said plaintiff.

Defendant, therefore, asks that an account may be taken of the

amount received by plaintiff on its said claim, and that the amount to which the plaintiff is legally entitled to prove against the trust represented by this defendant be ascertained by this court, and this defendant is ready and willing to pay the dividends declared upon whatever sum may finally be ascertained to be due on said plaintiff's claim.

JOHN W. HERRON,
Solicitor for Defendant.

Exceptions to Answer.

And afterwards, to wit, on the sixteenth day of September, A. D., 1890, the following exceptions were filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Circuit Court of the United States, Southern District of Ohio, Western Division.

THE CHEMICAL NATIONAL BANK *vs.* DAVID ARMSTRONG, as Receiver of the Fidelity National Bank.	No. 4339. Exceptions to Answers.

Exceptions taken by the above-named plaintiff to the answer of the defendant for insufficiency and impertinency.

First exception. For that the said defendant has not in and by his answer, according to the best of his knowledge, remembrance, information and belief, answered the several allegations contained in the following portion of said bill, viz., the passage beginning, "that on, to wit, the second day of March, A. D., 1887, the said Chemical national bank at the special instance and request of the said Fidelity national bank loaned to said Fidelity national bank," down to and inclusive of the words, "was used as the signature of said Fidelity national bank by the authority of said last-named bank."

13 Second exception. That the following allegation contained in said answer is insufficient and evasive, viz., "that it is true that on the second day of March, 1887, Ammi Baldwin was the cashier of the said Fidelity national bank, and authorized to perform all the duties usually performed by such an officer."

Third exception. That the following portion of said answer is insufficient and evasive, viz., the passage beginning with the words "defendant is unable to state from personal knowledge or from the records of said bank," down to and inclusive of the words "alleged certificate of deposit described in said bill."

Fourth exception. The following portion of said answer is impertinent, viz., that part thereof immediately following the passage mentioned in the next preceding exception, and beginning with the words, "but he does aver from information and belief that at said date, said Edward L. Harper," down to and inclusive of the words, "authorized by its officers and was fraudulent."

Fifth exception. That the following portion of said answer is impertinent, viz., that part thereof immediately following the passage mentioned in the last preceding exception, beginning with the words, "this defendant further avers from information and belief, that said certificate of deposit," down to and inclusive of the words, "appropriated by the said Harper to his own use."

Sixth exception. That the following portion of said answer is impertinent, viz., that part thereof immediately following the passage mentioned in the last preceding exception, beginning with the words "this defendant therefore avers that the said certificate of deposit should be paid by said Harper," down to and inclusive of the words "privileges of a surety in any proceedings instituted for its collection."

Seventh exception. That the following portion of said answer is insufficient and evasive, viz., the passage following that mentioned in the past preceding exception, and beginning with the words "this defendant, further answering, says and avers, from information and belief, that said Harper, at the time," down to and inclusive of the words "schedule attached to the bill of complaint," in that the same neither specifically admits nor denies the allegations contained in the bill respecting the same matters, and also in that it does not aver whether the action by said Harper there stated did or did not purport to be action by him as an officer of said Fidelity national bank."

Eighth exception. That the following portion of said an-
14 swer is impertinent, viz., that passage beginning "that a fourth note of said J. V. Lewis, also endorsed by said J. V. Lewis," down to and inclusive of the words "and giving proper notice to said endorser."

Ninth exception. That the following portion of said answer is insufficient and evasive, viz., the passage beginning with the words "this defendant further avers that said plaintiff, in addition to the sums received as hereinbefore stated," down to and inclusive of the words "secured by mortgage to the amount of $9,600.00," for that, first it refers to collateral forwarded by said Harper without averring whether in so doing said Harper purported to be acting as an individual or as an officer of said Fidelity national bank; and, secondly, it does not aver *then* the other sums and secureties therein stated to have been received by the plaintiff were received, or whether before or after the filing of the bill of complaint in this cause.

Tenth exception. The following portion of said answer is impertinent, viz., that beginning with the words "and the other were in equity the property of the said Fidelity national bank," down to and inclusive of the words "and that therefore the said bank was in equity the owner of said promissory notes."

Eleventh exception. And should the last exception not be sustained by the court the passage so excepted to for impertinency is also insufficient and evasive, in that it does not allege what sums of money, if any, were paid to the respective makers and endorsers of said promissory notes from the funds of the Fidelity national bank.

Twelfth exception. The following portion of said answer is impertinent, viz., the passage beginning "defendant further says that said plaintiff presented to him," down to and inclusive of the words "which offer was refused by the said plaintiff."

And said complainant humbly insists that the impertinent matter aforesaid ought to be expunged from said answer, and that the matter aforesaid alleged to be evasive and insufficient in so far as the same may not be expunged, ought to be amended, and humbly prays that said answer may be amended accordingly.

WM. WORTHINGTON,
Solicitor and Counsel for Complainant.

Entry Sustaining Exceptions; Leave to Amend.

And afterwards, to wit, on the twenty-seventh day of January, A. D. 1891, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal Z, p. 274.

The exceptions taken by the plaintiff to the answer of the defendant coming on to be heard, and having been argued by counsel and considered by the court, it is now ordered—

That the first of said exceptions be sustained, and that the defendant make full, perfect and complete answer to the portion of the bill specified in said exception, viz., the passage beginning "that on, to wit, the second day of March, 1887, said Chemical national bank," down to and inclusive of the words "was used as the signature of said Fidelity national bank by the authority of said last-named bank."

That the second exception be sustained, and that the defendant make answer and state whether or not the signature of said Ammi Baldwin to said certificate of deposit was used as the signature of said Fidelity national bank by the authority of said last-named bank.

That the third exception is sustained and the defendant is required to answer, and either admit or deny that the plaintiff loaned to the said Fidelity national bank said sum of $300,000 on the faith and credit of the certificate of deposit described in said bill.

That the fourth, fifth and sixth exceptions are sustained and that part of said answer beginning with the words "but he does aver from information and belief that at said date said Edward L. Harper was engaged," down to and inclusive of the words "is entitled to all the rights and privileges of a surety in any proceeding instituted for its collection," is expunged from said answer.

That the seventh exception is sustained and the defendant is required to answer further that portion of the bill beginning with the words "and at the same time, to wit, on said second day of March said Fidelity national bank delivered to said chemical national bank as collateral security," down to and inclusive of the words "marked Exhibit A" which schedule is hereby made part of this bill of com-

plaint, as collateral security for the payment of said loan, made upon the second day of March A. D. 1887."

That the eighth exception is sustained and the passage in said answer beginning with the words "that a fourth note of said J. V. Lewis," down to and inclusive of the words "and giving the proper notice to said endorser," is expunged from said answer, but leave is given to defendant to answer further, show, if so he can, that
16 all right to recover upon said note has been lost by the negligence of the plaintiff.

That the ninth exception is sustained and the defendant is required to amend the portion of the answer beginning with the words "this defendant further avers that the said plaintiff, in addition to the sums received as before stated," down to and inclusive of the words "secured by mortgage to the amount of $9,600," by stating whether or not the collateral therein referred to was, or was not, forwarded to plaintiff by the Fidelity national bank, or an officer thereof, acting as such officer, and further stating the time when the plaintiff received the other sums and securities therein referred to.

The tenth exception is sustained and that portion of said answer beginning with the words "and the others were in equity the property of the said Fidelity national bank at the time when the same were forwarded," down to and inclusive of the words "and that therefore said bank was in equity the owner of said promissory notes" is expunged from said answer.

That the twelfth exception is sustained and the portion of said answer beginning with the words "defendant further says that said plaintiff presented to him, as receiver," down to and inclusive of the words "and that therefore said bank was in equity the owner of said promissory notes" is expunged from said answer.

That the twelfth exception is sustained and the portion of said answer beginning with the words "defendant further says that said plaintiff presented to him, as receiver" down to and inclusive of the words "which offer was refused by the said plaintiff," is expunged from said answer.

And leave is given to the defendant to file an amended answer correcting his former answer in the matters above set forth within five days from the entry hereof.

Amended Answer.

And afterwards, to wit, in the fourth day of February, A. D. 1891, the following amended answer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

17 United States Circuit Court, Southern District of Ohio, Western Division.

THE CHEMICAL NATIONAL BANK OF NEW YORK
vs.
DAVID ARMSTRONG, Receiver of the Fidelity National Bank. } Amended Answer.

The amended answer of David Armstrong, receiver, to the bill of complaint filed in this cause by complainant.

Now comes the said David Armstrong, as receiver of the Fidelity National Bank, of Cincinnati, Ohio, and for amended answer to the several matters set forth in the bill of complaint filed in this cause, or to so much thereof as he is advised that it is material or necessary for him to answer, says:

He admits that the complainant is a corporation organized and doing business as set forth in said bill of complaint.

He admits that the Fidelity National Bank of Cincinnati was organized and did business as set forth in said bill, and that on the twenty-first day of June, 1887, the Comptroller of the Currency found that the said Fidelity national bank was insolvent, and on the twenty-seventh day of June, 1887, appointed this defendant the receiver of the same, and that this defendant accepted the said appointment, and was duly qualified as such receiver, and has acted as such since that date, and is still so acting.

He admits that on the twelfth day of July, 1887, by decree of the circuit court *for* the United States for the southern district of Ohio all the rights, privileges and franchises of said association were forfeited and the same was dissolved.

And this defendant further answering says that according to the best of his knowledge, remembrance, information and belief, he denies that on the second day of March, 1887, The Chemical National Bank, complainant, loaned to the Fidelity national bank the sum of three hundred thousand ($300,000) dollars; he denies that any such loan was made by said Chemical national bank to said Fidelity national bank on the faith and credit of the alleged certificate of deposit set forth in said bill of complaint, and he denies that said alleged certificate of deposit was executed by Ammi Baldwin as the act of the said Fidelity national bank, and by the authority of said bank.

18 Respondent admits that Ammi Baldwin was on the second day of March, 1887, the cashier of the said Fidelity national bank, but he denies that he was authorized by the said bank to execute or deliver the alleged certificate of deposit set forth in said bill.

This respondent further answering upon information and belief, says: that on the second day of March, 1887, and prior thereto, Edward L. Harper was the vice-president of the Fidelity national bank, and was engaged in large speculations on his own account, and in such speculations was using the funds of said bank; that in such use of the funds of said bank, he was assisted by said Ammi

Baldwin; but the said use of the said funds was not known to the other directors of said bank, and was not authorized by said bank, and was a fraudulent and illegal appropriation of the funds of said bank to the personal use of said Edward L. Harper.

Respondent further says that on the second day of March, 1887, a paper was signed by said Ammi Baldwin, represented as cashier of said Fidelity national bank, which respondent believes to be the same paper described in complainant's bill, and alleged to be a certificate of deposit of said Fidelity national bank; that said alleged certificate was not entered upon the books of the bank—was not taken from the certificate book from the place from which, if regular, it should have been taken; that its execution was unknown to the other officers of the bank, and was unauthorized by the said bank. That no consideration whatever was received by the said Fidelity national bank from said Harper, or from any other person, for the said certificate, nor was there any money deposited in the said bank as the basis of said certificate, but the same was wholly fictitious and fraudulent.

Respondent further says from information and belief that said certificate of deposit was forwarded to the Chemical national bank by said Harper and in connection therewith the promissory note described in complainant's bill, and the sum of $300,000 was received by said Harper from said Chemical national bank; said Harper represented to the officers of the said bank that said money was received from a loan made to him; and by his direction the same was placed to his credit on his personal account, and the said sum was thereupon drawn out by him and used for his individual use, and the other officers of said bank had no knowledge that the facts were otherwise than as represented by him; that the large portion of said promissory notes were the personal property of said Harper, in which the Fidelity national bank had no interest; that said Edward L. Harper had not on deposit in said Fidelity national bank the sum of $300,000 as the basis for said certificate of deposit, which fact was known to the complainant; that the complainant also knew that the promissory notes forwarded to it as collateral security for said loan, and belonging to said Harper were his property, and not of the Fidelity national bank; that no part of the money paid by the said complainant was received by the Fidelity national bank, but was appropriated by said Harper to his individual use.

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This respondent further answering upon information and belief says that three of the notes forwarded by said Edward L. Harper to the said complainant on the second of March, 1887, and which notes were the property of said Harper, made by J. W. Wilshire, to the order of and endorsed by J. V. Lewis, for the sum of $25,000 each, were paid by said J. V. Lewis, at maturity, to the complainant; that the fourth note of said Wilshire endorsed by said Lewis for a like amount, due June 28, 1887, was not presented for payment by said complainant at maturity, and in consequence of said neglect to present the same, the same was not paid, and said J. V. Lewis was thereby discharged; that said J. V. Lewis was entirely solvent, bu

refuses to pay the same in consequence of the neglect to notify him as endorser, in due time, of the non-payment of said note.

And this respondent avers that the negligence of the complainant in the premises was the sole cause of said note not being paid.

And respondent further avers that since the bringing of the present action the complainant has been paid from the notes so sent to it by said Harper, and which belonged to him, the following: that upon the notes of the Champion Machine Company described in the bill there has been paid to the complainant the sum of $4,481.49 in cash, and the bonds of the Champion Machine Company to the amount of $5,800, and the bonds of Whitely, Fassler & Kelly, secured by mortgage to the amount of $9,600.

Respondent also avers that the complainant, upon the payment of the three sums of $25,000 as hereinbefore set forth, credited the same on the said alleged loan of $300,000, and reported the same to this respondent as payments on that account, and treated said payments in all respects as proper credits on said alleged loan.

This respondent, therefore, claims that the Fidelity national bank was not liable to the complainant for the amount of said loan, and that complainant is not entitled to prove the same as a valid claim against the trust estate held by him. And, further, that if by reason of the fraud of said Harper and said Baldwin, and their unauthorized acts, as hereinbefore set forth, this court shall find that said Fidelity national bank was liable for the amount of said alleged loan, then he asks that all payments made to the complainant from the collateral paper belonging to said Harper, and forwarded by him to the complainant as security for said loan, shall be credited thereon; that the amount of the note of said Wilshire, not being paid as aforesaid in consequence of the negligence of the complainant to present the same for payment shall be charged to complainant and credited on said loan; and that the balance of said collateral paper shall be first exhausted, and the proceeds of the same credited also on said loan; and that the complainant shall be permitted to prove only the amount remaining due on said loan after said credits have been made, and that complainant shall have all other and further relief in the premises as in equity he may be entitled to.

JOHN W. HERRON,
Solicitor for Defendant.

And afterwards, to wit, on the eleventh day of February, A. D. 1891, the following replication was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Replication.

THE CHEMICAL NATIONAL BANK OF NEW YORK
vs.
DAVID ARMSTRONG, Receiver of the Fidelity National Bank.
No. 4339.
Replication.

Replication of the Chemical National Bank of New York, plaintiff, to the amended answer of David Armstrong, receiver of the Fidelity national bank, defendant.

This repliant, saving and reserving to itself all, and all manner of advantage of exception to the manifold insufficiencies of the said amended answer, for replication thereunto saith, that it will aver and prove its said bill to be true, certain and sufficient in the law to be answered unto; and that the said amended answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this repliant; without this, that, any other matter or thing whatsoever in the said amended answer, contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove, as this honorable court shall
21 direct; and humbly prays, as in and by its said bill it hath already prayed.

WILLIAM WORTHINGTON,
Solicitor for Plaintiff.

And afterwards, to wit, on the twenty-first day of March, A. D. 1891, the following deposition(s) was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

PLAINTIFF'S EXHIBIT No. 1.

Briggs Swift, president; E. L. Harper, vice-president; Ammi Baldwin, cashier; Benj. E. Hopkins, ass't cashier.

United States depository.

The Fidelity national bank.

Capital, $1,000,000.00.

EXHIBIT A, Nov. 28, 1890. J. G. C., N. P., Y. Co.

CINCINNATI, *February* 28, 1887.

Plaintiff's Exhibit No. 1, March 11th, 1891. J. A. S., ex'r.

Wm. J. Quinlan, Jr., cashier Chemical national bank, New York city.

DEAR SIR: Enclosed herewith we hand you for credit, our certificate of deposit, No. 345, for $300,000.00, with bills as collateral, as follows:

Jung Brewing Co., due June 24, 1887 ..... $25,000 00
Ret. May 23, '87.
Jung Brewing Co., due April 24, 1887 ..... 10,000 00
Swift's iron and steel w'ks, due May 18, 1887 ..... 25.000 00
Ret. May 23, '87.
Swift's iron and steel w'ks, due May 28, 1887 ..... 25,000 00
Ret. May 23, '87.
J. W. Wilshire, endorsed by—
J. V. Lewis, due May 28, 1887 ..... 25,000 00
Ret. May 23, '87.
J. V. Lewis, due June 28, 1887..... 25,000 00
J. V. Lewis, due July 28, 1887..... 25,000 00
J. V. Lewis, due Aug. 28, 1887..... 25,000 00
Riverside iron & steel w'ks, due May 22, 1887..... 15,000 00
Ret. May 23, '87.
22 Riverside iron & steel w'ks, due May 31, 1887.... 15,000 00
Ret. May 23, '87.
C. Aultman & Co., due May 16, 1887 ..... 10,000 00
Ret. May 23, '87.
C. Aultman & Co., due May 20, 1887 ..... 10,000 00
C. Aultman & Co., due May 23, 1887 .... 10,000 00
Ret. May 23, '87.
C. Aultman & Co., due May 27, 1887 ..... 10,000 00
Ret. May 23, '87.
C. Aultman & Co., due May 31, 1887 ..... 10,000 00
Ret. May 23, '87.
Champion Ice Machine Co., due June 1, 1887..... 5,500 00
Ret. May 23, '87.
Champion Ice Machine Co., due June 1, 1887..... 5,378 01
Ret. May 23, '87.
Champion Ice Machine Co., due June 10, 1887..... 4,350 10
Ret. May 23, '87.
Champion Ice Machine Co., due June 10, 1887..... 4,610 00
Ret. May 23, '87.
Champion Ice Machine Co., due June 11, 1887..... 5,487 00
Ret. May 23, '87.
Champion Ice Machine Co., due June 15, 1887..... 5,700 00
Ret. May 23, '87.
Champion Ice Machine Co., due June 22, 1887..... 5,620 19
Ret. May 23, '87.
Champion Ice Machine Co., due June 24, 1887..... 5,850 00
Ret. May 23, '87.
Champion Ice Machine Co., due June 24, 1887..... 4,500 00
Champion Ice Machine Co., due July 28, 1887 ..... 5,200 00
Champion Ice Machine Co., due Aug. 3, 1887..... .... 5,000 00
Champion Ice Machine Co., due Aug. 20, 1887..... 4,500 00

We desire to keep a large reserve with you and we trust you will make the rate as low as you proposed some time since.

Please place the amount to our credit and advise the rate.

Respectfully yours, E. L. HARPER,
Vice-President.

Certificate of Deposit.

This certificate is not subject to check, but must be presented to draw money.

The Fidelity national bank.

No. 345.

PLAINTIFF'S EXHIBIT 2, March 11, 1891. J. A. S., ex'r.

CINCINNATI, *Feb.* 28, 1887.

E. L. Harper has deposited in this bank three hundred
23 thousand dollars ($300,000.00) payable to the order of himself on return of this certificate in current funds.

AMMI BALDWIN, *Cashier.*

$300,000.00.

Endorsed: "E. L. Harper."

Plaintiff's Exhibit No. 2, attached to the deposition of Wm. J. Quinland, Jr.

Under instructions from counsel *from* appellant and appellee, Exhibit No. 3, is not printed in full, but only the following abstract or description thereof:

Said exhibit is in the form of an account headed:

"Dr. Fidelity national bank in account with Chemical national bank. Cr.

The first entries thereof are dated March 1st, 1887. That entry upon the credit side, being a balance brought down. The last entries are dated April 1, 1887. On the right or credit side of the account, under date of March 7, 1887, is the following entry:

"Loan, $300,000.00."

PLAINTIFF'S EXHIBIT No. 4.

Exhibit "C," book 28, '90. J. G. C., N. P., N. Y. C.

Plaintiff's Ex. 4, March 11, 1891. J. A. S., ex'r.

The Fidelity national bank.

CINCINNATI, *May* 21, 1887.

Chemical national bank, New York city.

GENTLEMEN: Enclosed herewith we hand you to hold as collateral the following bills:

H. S. Bundy, demand	$50,000 00
Swift's iron and steel w'ks, May 13th, 4 mos	25,000 00
Swift's iron and steel w'ks, May 18th, 4 mos	25,000 00
J. W. Wilshire, April 28th, 5 mos	25,000 00
Riverside Iron and Steel Co., due Sept. 25th	15,386 35
Riderside Iron and Steel Co., due Oct. 5th	15,386 35

Whitely, Fassler & Kelly, April 1st, 6 mos.....	4,633	07
Whitely, Fassler & Kelly, April 1st, 7 mos.....	5,343	07
24 Whitely, Fassler & Kelly, April 1st, 8 mos. ...	3,892	10
Whitely, Fassler & Kelly, April 20th, 6 mos....	5,608	09
Whitely, Fassler & Kelly, April 20th, 8 mos.....	4,413	17
Whitely. Fassler & Kelly, May 2nd, 5 mos..	5,370	04
Fassler, May 2nd, 6 mos.....	4,000	00
Fassler, May 2nd, 7 mos.....	4,890	10
Fassler, May 2nd, 8 mos.....	4,850	00
Fassler, May 10th, 5 mos.....	5,640	00
Fassler, May 10th, 6 mos.....	5,872	00
Fassler, May 10th, 7 mos.....	5,710	52
Fassler, May 10th, 8 mos.....	4,210	00
Fassler, May 16th, 6 mos.....	5,209	20
Fassler, May 16th, 7 mos.....	5,178	40
	$230,592	46

Will you kindly return to me the following:
C. Aultman & Co., due in May, five pieces.
Swift's iron and steel works, due in May, two pieces.
Champion Machine Co., due in June, 8 pieces.
Jung Brewing Co., due in June, 1 piece.
J. W. Wilshire, due in May, 1 piece.
Riverside Iron and Steel Co., due in May, 2 pieces.
We will pay the loan July 15th, 1887, if agreeable to you, and will pay interest now to that date.

Respectfully yours,

E. L. HARPER,
Vice-President.

PLAINTIFF'S EXHIBIT No. 5.

David Armstrong, receiver of the Fidelity national bank.

Capital, $1,000,000.

Plaintiff's Exhibit 5, March 11, 1891. J. A. S., ex'r.

Department ——.

In reply, please refer to date and department.

CINCINNATI, OHIO, *Nov.* 14, 1887.

Wm. J. Quinland, Jr., cashier, Chemical national bank, New York.

DEAR SIR: Your letters of the 31st ult. and 3rd inst. received, with statement of interest account, and list of collateral notes, unmatured and protested items. My absence from the city will
25 explain to you the cause of delay in acknowledging receipt of same, I notice in the unpaid list note of J. W. Wilshire, endorsed by J. V. Lewis, due June 28, 1887, $25,000. This note, I am informed, was not protested by you, and by reason thereof, the endorser, J. V. Lewis, released. Mr. Wilshire being entirely insolvent, I will have to ask, and do hereby ask and request that you

credit the account of the Fidelity national bank with the amount of the note. Referring to the matter mentioned in your letter of the 3rd inst., would say that we have made an arrangement with the Montreal bank, Chicago, whereby we hope at an early day to remove the embargo placed on the collateral in your hands, and procure the return of same into our hands. Concerning our matters generally, I will add, that I will, in the settlement of the affairs of the Fidelity national bank and the Chemical national, claim that the loan of $300,000 bond (loan) on the certificate of deposit dated February 28, 1887, and secured by certain collateral notes, is and should be treated as an entirely separate and distinct transaction from the indebtedness to the Chemical on account of overdrafts, and the proceeds of the collateral notes deposited by the Fidelity to secure said overdrafts cannot be applied by you to the payment of the $300,000 loan or any part thereof, but that the proceeds of the said collateral notes collected by you, and now in your hands, can only be applied to the payment of the balance due you from the Fidelity by means of overdrafts, excluding therefrom said loan of $300,000 and the interest thereon.

That in making up the account between us, you will be entitled to credit on the said $300,000 such collections as you have made on the collateral notes placed with you by the Fidelity national bank to secure said loan, and for the balance due on that account, if any, you must prove your claim against said bank and share with the general creditors; that of the $1,000,000 and odd collateral notes placed by said bank with you to secure overdrafts you will be entitled to apply of the proceeds of collections on same now in your hands an amount sufficient to pay said overdrafts, or balance due you on account, excluding said $300,000 loan and the interest thereon.

As a preliminary step looking to the settlement of our affairs in accordance with my views as above, I hereby make a formal demand on you to credit the account of the Fidelity National Bank of Cincinnati, Ohio, with the amount of the J. W. Wilshire note endorsed by J. V. Lewis, due June 28, 1887, $25,000 together with the interest thereon, and that you remit to me as receiver of said bank
26 the balance due from you from the proceeds of the collateral notes deposited with you to secure said overdrafts and collected by you, after deducting therefrom the amount due you on account of overdrafts, exclusive of the balance due you on said $300,000 loan and interest.

Very respectfully, D. ARMSTRONG, *Receiver.*

Under instructions from counsel for appellant and appellee, Exhibit No. 6 is not printed in this place in the record. It is printed hereafter on page 142, as Armstrong's Exhibit Nos. 1 and 2.

PLAINTIFF'S EXHIBIT No. 7.

Circuit Court of the United States for the Southern District of New York.

DAVID ARMSTRONG, as Receiver of the Fidelity National Bank,
vs.
THE CHEMICAL NATIONAL BANK.
} In Equity. April Term, 1890.

Plaintiff's Exhibit 7, March 11, 1891. J. A. S., ex'r.

This cause came on to be further heard at this term, and was argued by counsel and thereupon, upon consideration thereof it was ordered, adjudged, and decreed as follows:

There is due to David Armstrong, receiver of the Fidelity national bank from the defendant, The Chemical National Bank, the sum of $271,808.34 with interest thereon from the seventh day of May, 1890, being the date of the master's report in this cause.

And it is further ordered, adjudged and decreed that the said, The Chemical National Bank, do pay to the complainant or to his solicitor for him the said sum of $271,808.34 with interest thereon from the date of the said master's report.

And it is further ordered, adjudged and decreed that the Chemical national bank do pay to the complainant or his solicitor the costs of his suit in this behalf to be taxed, and that in default of payment thereof or of the said other moneys above adjudged to him as aforesaid the complainant have execution according to law.

WM. J. WALLACE.
JOHN A. SHIELDS, *Clerk.*

(A copy.)
(L. S.)

27 PLAINTIFF'S EXHIBIT No. 8, TELEGRAM.

Plaintiff's Exhibit 8, March 11, 1891.

Exhibit B, 1732, October 1, 1889. J. A. S., special examiner.

Number	Sent by	Rec'd by	Check
B 189 C	R.	In.	be pd. me.

Dated CINCINNATI, O., 19.

Rec'd at 4.58 p. (m.).

MAY 19.

To Chemical national bank, New York:

"We send other bills to take place. Will want all returned here without presenting, as we advised parties to arrange payment here.

"FIDELITY NATIONAL BANK."

PLAINTIFF'S EXHIBIT No. 9.

Briggs Swift, president; E. L. Harper, vice-pres.; Ammi Baldwin, cashier; Benj. E. Hopkins, ass't cash.

United States depository.

The Fidelity national bank.

Capital, $2,000,000.00. Surplus, $400,000.00.

PLAINTIFF'S EXHIBIT 9, March 11, 1891. J. A. S., Ex'r.

Exhibit C, October 1, 1889. J. A. S., special examiner.

William J. Quinlan, Jr., cashier, New York.

DEAR SIR: Please do not present any of the collateral paper for payment. We have advised parties we would order back and charge up here. We will tomorrow send you new notes to take the place of ones maturing. We will pay the loan July 15th, and will pay interest till that date, if agreeable to you.

Yours truly, E. L. HARPER, *V. P.*

28 DEFENDANT'S EXHIBIT No. 10.

DEFENDANT'S EXHIBIT 10, March 12, 1891. J. A. S., Ex'r.

DR. Chemical national bank in account with E. L. Harper & Co. CR.

1886.			1886.		
May 17	Balance from Ledger 2.	2,195 85	May 21		600
24		30,000	24		30,000
29		50,000	29		50,000
June 1		50,000	June 1		50,000
7		59,450 48	7		50,000
July 9	24,340.92	23,841 91	8		3,986 21
	499.01	25,000	9		6,000
12		100,000	July 12		25,000
29	T. L.	50,000	14		23,500
Aug. 9					
Oct. 27	27,560.53	27,155 51	30		50,000
	405.02				50,000
1887.		50,000	31		50,000
					1,000
Jan. 3		61,970 57	Aug. 9		25,000
15	63,169.72	5,688 57	Oct. 29		458 33
15	1,199.15				
15		535,302 89	Nov. 1		50,000
			Dec. 31		50,000
			1887.		10,000
			Jan. 3		4,500
			19		4,000
			20		
			24		534,044 54
			29	Bal.	1,258 35
		535,302 89			535,302 89
Feb. 7		1,258 35	Mch. 2	87-2-28-87 to Fidelity nat'l b'k	
					1,000
April 4		50,000	Apr. 4	For Fidelity national bank.	50,000
13	T. L., E. L. Harper.	50,000	13	4-11 For Fidelity national bank.	50,000
		101,258 35			101,000
			89		
			Feb. 16	2-12-89 J. H. Stewart, trustee.	8 35
					101,008 35
				Bal.	250
Mch.'89		101,258 35			101,258 35
			89		
Mch. 5	Balance	250	Apr. 12	Duplicate.	250
1889.		250			250

DEFENDANT'S EXHIBIT No 11.

Receiver of the Fidelity national bank.

1890. May 22	S. A. Walker, solicitor, payment made under order of Judge Wallace.	272,796 07		2890. May 22	Amount of interest paid receiver of Fidelity nat'l bank under decision of Judge Wallace.		47,796 07
				June 17	Cash Champion Machine Co		4,481 49
				"	Bonds " " "		5,800
				"	Whitely, Fassler & K. bonds		9,600
				Dec. 31	From profit and loss		50,000
					Balance		155,118 51
		272,796 07					272,796 07

Defendant's Ex. 11.
March 12, 1891.
J. A. S., ex'r.

4—276

4141

30 *Deposition of Wm. J. Quinlan.*

United States Circuit Court, Southern District of Ohio, Western Division.

CHEMICAL NATIONAL BANK, Plaintiff,
vs.
DAVID ARMSTRONG, as Receiver of the Fidelity National Bank, Defendant.

Testimony on behalf of plaintiff, taken under the annexed notice before John A. Shields, Esq., United States commissioner, at the Chemical national bank, No. 270 Broadway, New York, on Wednesday, March 11, 1891, at 11 a. m.

Appearances: Charles Jones, Esq., for plaintiff; John W. Herron, Esq., for defendant.

WILLIAM J. QUINLAN, Jr., of lawful age, being by me first duly cautioned and sworn as a witness on behalf of the plaintiff, deposes and says as follows:

By Mr. JONES:

Q. 1. What is your name, age, residence, and occupation?

A. Name, William J. Quinlan, Jr.; age, 46; residence, 186 South Oxford street, Brooklyn; occupation, cashier of the Chemical national bank, New York.

Q. 2. How long have you been such cashier?

A. Thirteen years.

Q. 3. Did the Chemical bank have dealings with the Fidelity National Bank of Cincinnati, Ohio?

A. Yes, sir.

Q. 4. State the general character of the transactions between them before March, 1887?

A. The Fidelity national bank remitted to us checks and drafts and various papers representing money for their credit, and we in like manner remitted to them items for our credit.

Q. 5. Was there a collection account independent of any other account between those banks?

A. There was, sir.

Q. 6. Of what did the general account consist irrespective of the collection account?

A. Items received from the Fidelity national bank for their credit, against which they were entitled to draw.

Q. 7. And against which they did draw?

A. And against which they did draw.

Q. 8. That account did not differ from the ordinary account between a bank and its depositor.

A. No; it was the ordinary account.

31 Q. 9. Have you a letter received from the Fidelity national bank under date of February 28, 1887?

A. Yes, sir.
Q. 10. Produce it?

The witness produces the letter.

Q. 11. Are you acquainted with the signature of E. L. Harper, vice-president, signed to that?
A. Yes, sir.
Q. 12. Is it the genuine signature?
A. It is.

The letter referred to is offered in evidence on behalf of the plaintiff, and marked Plaintiff's Exhibit 1, March 11, 1891, J. A. S., ex'r.

Q. 13. The memoranda on the right-hand margin of the letter were made after its receipt, were they?
A. Yes. sir.
Q. 14. And formed no part of the letter when it was received?
A. No, sir.
Q. 15. About when did you receive that letter, Mr. Quinlan?
A. March 7th.
Q. 16. State what it enclosed?
A. It enclosed a certificate of deposit of the Fidelity national bank for $300,000, and a number of collateral notes aggregating $326,000 and odd dollars.
Q. 17. The collateral notes mentioned in it?
A. Yes, sir.
Q. 18. Look at the paper now shown you, and state whether that is the certificate of deposit enclosed in the letter?
A. It is, sir.
Q. 19. Are you acquainted with the signature of Ammi Baldwin, the cashier?
A. Yes, sir.
Q. 20. Look at that, and state whether that is his signature (handing witness certificate)?
A. That is his signature.
Q. 21. And the endorsement is whose?
A. E. L. Harper's.

The certificate of deposit referred to is offered in evidence on behalf of the plaintiff, and marked Plaintiff's Exhibit 2, March 11, 1891, J. A. S., ex'r.

Q. 22. After receiving Exhibit No. 1 with the enclosures, what did you do?
A. We placed to the credit of the Fidelity national bank $300,000 as a temporary or call loan.
Q. 23. What is the paper I now show you, dated March 2, 1887?
32 A. "March 2, 1887. Credit Fidelity national bank $300,000. Charge temp. Loans, W. J. Q., Jr., C." (meaning cashier).
Q. 24. When was that ticket made?

A. March 2, 1887.

Q. 25. In what book was this sum originally entered?

A. The book of bank credits from which the postings in the ledger are made.

Q. 26. What do you call it?

A. Foreign bank credits.

Q. 27. Do you produce the book in which the original entry was made?

A. Yes, sir (producing book), the entry is as follows: "Fidelity, temp. loans $300,000."

Q. 28. What is the meaning of "temp."?

A. Temporary or call loans; it is an abbreviation of temporary.

Q. 29. Was that item posted into the ledger?

A. Yes, sir; it was posted from this book into the ledger.

Q. 30. Into the general account?

A. Into the general account of the Fidelity national bank, against which they were constantly drawing.

Q. 31. How frequently, in the course of business, was it that you sent the accounts current to the Fidelity?

A. I think semi-monthly; I know monthly.

Mr. JONES: I read from the printed record in the suit in the *supreme* court of the United States for the southern district of New York, in which David Armstrong as receiver of the Fidelity national bank was complainant and the Chemical National Bank defendant, from the testimony of J. Harry Waters, the following:

"Q. Have you in your possession the account current sent the first of April, 1887, sent by the Chemical national bank, giving the account current for March, 1887, between the two banks?

"A. Yes, sir; I have it.

"Q. Please examine it and see whether it contains a credit for the three hundred thousand ($300,000) dollars?

"A. Yes, sir; it does, on March 2nd, on the first page of the account current."

Q. 32. The accounts current sent were a transcript of the ledger account, were they not?

A. They were, sir.

Q. Look at the paper I now show you and state what that is?

A. An account current of the Fidelity National Bank of Cincinnati in account with the Chemical national bank.

33 Q. 34. For what month?

A. For the month of March, 1887.

The account referred to is offered in evidence on behalf of plaintiff and marked "Plaintiff's Exhibit 3," March 11th, 1891, J. A. S., ex'r.

Q. 35. "Exhibit 3" is a copy or a duplicate of the account current sent to the Fidelity national bank?

A. Yes, sir.

Q. 36. If it should be found on inspection of that account current that instead of a loan it was entered as time loan in the account current, it was an error in transcribing?

A. Yes, sir; because the books show that.

Q. 37. Did you answer the letter "Exhibit No. 1," February 28, 1887?

A. Yes, sir.

Q. 38. Did you preserve a copy of your answer?

A. Yes, sir; but I can't put my hand on it.

Q. 39. You didn't preserve a copy of it?

A. No; it was presented, I think, in evidence; a letter of that character was never copied, it was merely an acknowledgment.

Mr. JONES: I read from the printed record in the suit above mentioned the following:

Geo. G. Williams, president; Wm. J. Quinlan, cashier; J. I. Barr ass't cashier.

Chemical national bank.

NEW YORK, *March* 2, 1887.

A. Baldwin, Esquire, cashier.

DEAR SIR: Your favor of the 28th inst. has been received.

We credit Fidelity national bank $300,000, and shall be considerate as to rate of interest when the loan is paid.

I presume that you are aware of the very material change in rates within the past two or three days. Loans for 60 and 90 days on stock exchange collaterals (railroad stocks and bonds) which were ruling at 4½ per cent. last week are now 5½ to 6 per cent. I mention this to show you the present condition of the money market.

Respectfully, WM. J. QUINLAN, JR., *Cashier.*

Q. 40. Have you a letter from the Fidelity national bank under date of May 21, 1887?

A. Yes, sir.

Q. 41. Produce it?

The witness produces the letter.

The letter produced is offered in evidence on behalf of the plaintiff and marked "Plaintiff's Exhibit 4," March 11, 1891, J. A. S., ex'r.

34 Q. 42. How were the moneys placed to the credit of the Fidelity national bank and its account with you drawn out?

A. By drafts of the Fidelity national bank signed officially.

Q. 43. Did you receive the paper mentioned in "Exhibit 4"?

A. Yes, sir.

Q. 44. And did you return the paper which the letter asked to be returned?

A. We did.

Q. 45. The letter mentioned in the exhibit was in substitution of the paper returned?

A. It was, sir.

Q. 46. The paper described in "Exhibit A" annexed to the bill of complaint in this cause is all the paper that the Chemical bank had after the substitution of the paper under the letter of May 21st?

A. Yes, sir.

Q. 47. Did the Fidelity national bank, before the receiver was appointed, ever pay you the $300,000 or any part of it?

A. No, sir.

Q. 48. Has the receiver of the Fidelity ever paid or offered to pay you that sum since he was appointed?

A. No, sir.

Q. 49. Did you know or have any notice at the time that this loan of $300,000 was made, that Mr. Harper had anything personally or individually to do with it?

A. No, sir; emphatically no.

Q. 50. When did you first learn in any way that the notes received as collateral in March and May were not the property of the Fidelity national bank?

A. Many months after. I think, through David Armstrong, receiver.

Q. 51. When you met him in Cincinnati?

A. I think so.

Q. 52. You had no notice or knowledge of that fact when the loan was made?

A. No, sir; we were treating with the bank, not with him at all.

Q. 53. After the second of March, 1887, did the transactions between the Chemical national bank and the Fidelity continue?

A. Yes, sir; they did, daily.

Q. 54. And what was the general nature and character of those transactions?

A. Remittance(s) received from them and drafts paid on their account.

35 Q. 55. Some time in June, 1887, you received other collaterals from the Fidelity national bank?

A. We did, amounting to a million dollars.

Q. 56. A little over a million on their face?

A. A little over a million.

Q. 57. Did you make loans or advances after you received your collaterals?

A. Yes, sir; we did.

Q. 58. How did the Chemical bank treat the collaterals thus received in March and May and June?

A. When we received those in June we treated them as one, as massed; and so with our loans, we treated them as massed loans, massed collaterals. That is the view we took of it, and the way in which we treated it.

Q. 59. You acted on the theory that you had a right to apply the proceeds of all the collaterals to the payment of all the indebtedness or any part of the indebtedness of the Fidelity to the Chemical?

A. We did; and we certainly thought we had such a right.

Q. 60. After the receiver was appointed, did you send accounts current to him?

A. Yes, sir.

Q. 61. And you proceeded to collect what we will call the June collaterals after you received them?

A. We did, sir.

Q. 62. And you finally rendered an account to the receiver of the amounts that you received?

A. Yes, sir; we did.

Q. 63. And applied the proceeds for the payment of the entire indebtedness of the Fidelity to the Chemical bank?

A. Yes, sir.

Q. 64. And remitted to him some cash surplus after that application?

A. We did.

Q. 65. Now, up to that time, Mr. Quinlan, had you seen the receiver in reference to the accounts?

A. No, sir; I had not.

Q. 66. Had you had any correspondence with him in reference to the accounts or in reference to any particular claim, which you or he made, as to your right to make the application of the moneys you afterwards did?

A. Yes, sir.

Q. 67. That was before the rendering of the accounts?

A. Yes.

Q. 68. Look at the paper now shown you. From whom did you receive it?

36 A. From David Armstrong, receiver of the Fidelity national bank.

Paper referred to is offered in evidence and marked Plaintiff's Exhibit 5, March 11, 1891. J. A. S., examiner.

Q. 69. Did you answer that letter?

A. Yes, sir; on the 17th.

Q. 70. Did you keep a copy?

A. Yes, sir.

Q. 71. That letter is dated the 17th and 18th?

A. Yes, sir.

Q. 72. And that is the copy (showing witness letter)?

A. Yes, sir.

The letter referred to is offered in evidence on behalf of the Plaintiff's Exhibit 6, March 11, 1891. J. A. S., examiner.

Q. 73. The disagreement between you and the receiver of the Fidelity led to a litigation, did it not?

A. It did.

Q. 74. It resulted in a suit brought by the receiver against you to account for the June collaterals?

A. Yes, sir.

Q. 75. On the claim that you could not apply the proceeds to the payment of any existing indebtedness or any prior indebtedness?

A. Yes, sir.

Q. 76. And you were beaten?

A. We were beaten.

Q. 77. Then an account was taken of the proceeds of the June collaterals and of the indebtedness of the Fidelity to the Chemical

national bank for all the items exclusive of the three hundred thousand dollar loan and the amount found due to the receiver on that accounting was paid?

A. It was; the payments made to the Chemical on the March and May collaterals formed no part of the accounting.

Recess until 3 p. m.

After recess.

Q. 78. The interlocutory decree for an accounting in the suit above referred to was entered on the 22nd day of January, 1890, and the final decree May 7, 1890?

A. Yes, sir.

A copy of the final decree is hereto attached and marked Plaintiff's Exhibit 7, March 11, 1891. J. A. S., examiner.

37 Q. 79. Were any of the notes of J. W. Wilshire, endorsed by J. V. Lewis, which you held as collateral, paid?

A. Yes, sir.

Q. 80. State what notes and when.

A. Three notes of $25,000 each, paid respectively July 23, August 24 and October 1, 1887, in all $75,000.

Q. 81. Were there any entries of the payment made in your books of account?

A. Yes, sir; to the credit of the general collateral account of the Fidelity national bank.

Q. 82. The collateral account embracing all the collaterals which you have received from the Fidelity national bank?

A. Yes, sir.

Q. 83. As a matter of book-keeping was that the proper entry to make?

A. Yes, sir; I think so.

Q. 84. And these payments were made and those entries before you received from the receiver of the Fidelity, Plaintiff's Exhibit 5?

A. They were.

Q. 85. State upon what theory you acted in making those credits?

A. As I have already stated, we acted upon the theory that the loans were massed and the collaterals were massed.

Q. 86. Perhaps the court won't understand what that means.

A. In other words, that all collaterals received were to be held by us as general collateral for any and all loans and advances made.

Q. 87. State whether or not, up to the time that you credited these amounts as stated, you had received from Mr. Armstrong, the receiver, any intimation of the claim that he would make in reference to the collateral, as to how the proceeds should be applied.

A. I had not; the first intimation was in Mr. Armstrong's letter of November 14th.

Q. 88. And it was after November 14th that he brought his suit against the Chemical national bank for an accounting?

A. Yes, sir.

Q. 89. Look at the paper now shown you and state whether that was received by the Chemical bank.

A. Yes, sir; it was.

Q. 90. Look at the paper now shown you and state whether that was received by the Chemical bank?

A. Yes, sir; it was.

38 Q. 91. About when?

A. About May 19, 1887.

The telegram referred to is offered in evidence on behalf of the plaintiff, and marked Plaintiff's "Exhibit 8," March 11, 1891, J. A. S., examiner.

Q. 92. Look at that paper now shown you and state whether you received that?

A. Yes, sir.

Q. 93. About what time?

A. It was received about May 21, 1887.

Q. 94. Some time in May?

A. Yes, sir; about May 21st.

The letter referred to is offered in evidence on behalf of the plaintiff and marked Plaintiff's Exhibit 9, March 11, 1891, J. A. S., examiner.

Q. 95. When did the Fidelity national bank commence dealing with you, about when?

A. I think it was in the spring of 1886; I think it is in the testimony.

Q. 96. About the time of the organization of the bank?

A. Yes, sir. (After referring to book:) March 4, 1886.

Q. 97. How long did it continue?

A. Till it went into the hands of a receiver.

Q. 98. Did you see E. L. Harper, vice-president of the Fidelity in February or March, 1887, here in the city?

A. He was in the bank once or twice; I have forgotten the exact dates.

Q. 99. Well, did you see him at any time after you received the letter dated February 28, 1887?

A. I can't recall at the moment; I remember Harper being in here once or twice.

Q. 100. The question is as to the time?

A. I couldn't locate it, unless I gave it in the testimony at that time; at that time, it was clear to my mind; whatever testimony I gave then was clear.

Q. 101. Was he in the bank, to your knowledge, or did you see him after you received that letter of February 26th, 1887?

A. I have to give the same answer; if it is in the testimony, I did.

Mr. HERRON: Give your best recollection.

The WITNESS: I have no data in my mind to work upon. (After referring to printed record:) no, sir.

Q. 102. State whether or not E. L. Harper personally made any

representations to you, or to your knowledge to any of the officers of the bank, in respect to the $300,000 which was passed to the credit of the Fidelity national bank on the second of March, 1887?

A. Not until I saw him in Cincinnati.

39 Q. 103. I mean at about the time that was done?

A. Oh, no, sir.

Q. 104. Did E. L. Harper, or E. L. Harper & Co., and, if so, which, have an account with the Chemical national bank?

A. E. L. Harper & Co. had an account with us.

Q. 105. How as to transactions between the Chemical national bank and E. L. Harper & Co., were they kept distinct from the transactions between the Chemical national bank and the Fidelity national bank?

A. Entirely so.

Cross-examination of Wm. J. Quinlan, Jr.

Cross-examined by Mr. HERRON:

Q. 106. What entry was made on the book of the Chemical national bank as to the paper contained in Exhibit 1?

A. Collateral to a loan of $300,000 to the Fidelity national bank.

Q. 107. In what book was that made?

A. In our call loan book.

Q. 108. Will you please produce that book for inspection?

The witness produces the call loan book and points to the entry.

Q. 109. Now read to the stenographer the entry as it appears on that book?

A. Loan No. 1070, March 2, 1887, Fidelity national bank of Cincinnati, $300,000, certificate of deposit Fidelity national bank $300,000, receivables $326,695.30, returned May 19, 1887, $10,000, leaving $316,695.30; returned May 23, 1887, $222,495.30, leaving $94,200; add May 23, 1887, $230,592.46, result $324,792.46 charged account August 25, 1887; the entry in the book reads, those loans reduced $10,000 paid on account May 19, 1887; this was incorrect, for the note was returned to the Fidelity bank and was not paid, and hence that entry was erased.

Mr. JONES: What note?

The WITNESS: It was the Jung Brewing Company note for $10,000, due April 24, 1882; on the same day; that was Parson's entry, and I discovered it and sent it back to the Fidelity; then I saw on the book charged account August 25, 1887; that was because there was enough money transferred from the collateral account to make that entry.

Q. 110. What do you mean by "charge account"; charge what account?

A. Charge the general account.

Q. 111. Against the Fidelity national bank?

A. Against the Fidelity national bank; having transferred

40 sufficient from the collateral account, we placed sufficient money to the general account to pay the loan of the Fidelity.

Q. 112. Did these collaterals appear in any other book except the one you have shown?

A. No, sir.

Q. 113. Did you see those collaterals personally?

A. Yes, sir.

Q. 114. Can you tell me how they were endorsed?

A. I cannot. I think that——

Mr. JONES: You have some of them here, haven't you?

The WITNESS: Yes, some of them are in Worthington's hands.

Mr. HERRON: Refresh your memory, then.

The WITNESS (producing papers): I have copies of the Whitely, Fassler & Kelly notes; they are endorsed by E. L. Harper & Co.

Q. 115. And the notes which you have are endorsed?

A. Are endorsed A. P. Gahr.

Q. 116. Was any of the collateral paper endorsed by the Fidelity national bank?

A. I couldn't say,

Q. 117. Well, what is your best recollection?

A. I think not.

Q. 118. Where paper has been discounted by the bank, is it not usual to have on the paper a mark indicating that it belongs to the bank?

A. Not always.

Q. 119. Well, is it not usually done?

A. It is done by some banks.

Q. 120. Isn't it the general rule among banks?

A. Probably it is, the major part of them.

Q. 121. Had any of this paper any mark indicating that it belonged to the Fidelity national bank in the way I have indicated?

A. I have no recollection.

Q. 122. Have you any recollection of any of the paper having any such mark?

A. No, I have not.

Q. 123. Has the paper which you have now shown me any such mark?

A. (Looking at paper.) I wouldn't know how the Fidelity bank would mark its discounted paper.

Q. 124. Was there any mark at all of any kind?

A. I see no mark.

Q. 125. Have the copies which you have of the Whitely, Fassler & Kelly paper any such marks?

A. No, sir.

Q. 126. To go back, you said the reason this loan was
41 charged to general account on August 25th, was that you had then received sufficient collateral to pay the loan, is that true?

A. The collateral account showed a sufficient amount to credit, or more than enough—more than $300,000, the amount of the loan—and as, if it remained to the credit of collateral account we would be compelled to reserve 25 per cent. legal tenders, by placing that credit to the general account with a loan, we saved that reserve.

Q. 127. Now on the twenty-fifth of August, 1887, what amount had been collected from the collateral account altogether, and what was the state of the general account after you charged this loan?

A. I will have to refer to the books. (After referring:) The collateral account showed a credit of $302,046.60, and we transferred from the collateral account to the general account $302,000.66, and after charging the loan of March 2d of $300,000, it left a debit balance of $94,759.93.

Q. 128. Then as a matter of fact, there was not sufficient paid in to collateral account at that time to satisfy this loan when it was charged up?

A. Massing the two accounts, no, there was not.

Q. 129. You say that E. L. Harper & Co. had an account with the Chemical national bank, when did that account begin?

A. February 12, 1885.

Q. 130. According to your best recollection, did this account continue during the existence of the Fidelity?

A. I know it did.

Q. 131. Was it a large and active account?

A. Quite so, for a mercantile account.

Q. 132. Did that firm get paper discounted by the Chemical national bank?

A. They did.

Q. 133. To what extent, generally, without giving the items exactly?

A. Fifty to seventy-five thousand dollars—it is a pretty hard matter to say—probably more.

Adjourned to Thursday, March 12, 1891, at 10.30 a. m.

NEW YORK, *March* 12, 1891.

Met pursuant to adjournment.

Present: Counsel as before.

Continuation of the cross-examination of WILLIAM J. QUINLAN, JR.:

The WITNESS: I desire to make an explanation of my
42 answer to my Q. 111, in which I stated, "We place sufficient money to the general account to pay the loan of the Fidelity." We transferred $300,000 from the collateral account to the general account, to allow of the debit*ed* or charge of the loan of the Fidelity to the general account.

Q. 134. Refer to the account of E. L. Harper & Co. on your ledger, and state what that says of the amount of discounts for them between May 17, 1886, and January 15, 1887.

A. Discounts, $114,000; temporary loans, $100,000.

Q. 135. What loans were made after January to him?

A. A loan of $50,000 on April 13th—a temporary loan, call loan.

Q. 136. Will you please have made and attached to your deposition a copy of your ledger account with E. L. Harper & Co., between May 16, 1886, and its close?

A. I will.

The account referred to is offered in evidence on behalf of defendant, and marked Defendant's Exhibit 10, March 12, 1891, J. A. S., ex'r.

Q. 137. How intimately acquainted had you been with E. L. Harper, or were you acquainted with E. L. Harper during the time that this account was continued?

A. A very slight acquaintance—frequent remittances—I did not meet him personally more than probably twice; I can't recall more than two or three times in the whole transaction.

Q. 138. What knowledge had you as to his financial condition?

A. The statement of the mercantile agency; in which he was believed to be worth $700,000.

Q. 139. Did you know in what business he was engaged?

A. Yes, we knew what business he was in.

Q. 140. State what you learned, please?

A. May I be allowed to refer to the agency report? I think he was in the iron and hardware business; I don't know what they called him.

Q. 141. Refer to any report. Wasn't it the manufacture and sale of pig iron?

A. That was it; yes, sir.

Q. 142. And manufacturing iron, but he never was in the hardware business?

A. Well, pig iron; I supposed he was a reputable merchant.

Q. 143. Prior to March, 1887, had the Fidelity national bank borrowed any money of the Chemical national bank?

A. I don't recall.

43 Q. 144. Can you refer to the account and answer the question?

A. Yes, I can.

Q. 145. Please do so.

A. (After referring to account.) No, sir; nothing prior thereto.

Q. 146. Was there any correspondence with any other persons in reference to that loan except Mr. Harper?

A. No, sir.

Mr. JONES: On either sides.

Mr. HERRON: I mean, did the bank correspond with any person except Mr. Harper?

The WITNESS: I acknowledge the loan to Ammi Baldwin, cashier.

Q. 147. As in the letter that you have already testified to?

A. Yes, sir.

Q. 148. What agreement was there beforehand as to the security on which that loan should be granted?

A. None whatever.

Q. 149. Had you no knowledge as to what the security would be prior to receiving the papers from Mr. Harper?

A. None whatever; I didn't know that he even applied for a loan.

Q. 150. Then the reception of the certificate of deposit and other bills receivable in the letter of February 28th, was the first knowl-

edge that you had that the Fidelity bank would certainly apply for a loan, and the character of the security that was offered?

A. The very first.

Q. 151. When you received that certificate of deposit, was there anything on its face to show that the Fidelity national bank had any interest in it?

A. The inference was that E. L. Harper had deposited $300,000 with the Fidelity national bank; that is what the certificate says.

Q. 152. And to whom did that certificate belong as far as you could judge?

A. We supposed it was a transaction with the Fidelity national bank altogether; it is a customary way for banks in the West and South to borrow in that manner for several reasons: first, it increases their deposit line, and in the second place they do not have to show a rediscount or a loan, and hence it is a very common thing for loans to be made of that character—a certificate of deposit with a mass of collaterals attached.

Q. 153. Then do I understand that you mean that the certificate is a manufactured piece of paper, without money being deposited as the basis of it?

44 A. We never know; we don't make the loan on the certificate of deposit.

Q. 154. Well, you say there is a custom to borrow money in that way?

A. Yes; it is very common.

Q. 155 That is, by issuing a certificate of deposit?

A. Very common.

Q. 156. Is it customary in such cases that a certificate of deposit shows money deposited in the bank as a basis of the certificate?

A. I don't know; we don't know what happens at the other end.

Q. 157. Is that all the answer you can make to that question, Mr. Quinlan?

A. Yes, sir.

Q. 158. Then you did not know that that certificate of deposit was different from what appeared to be on its face?

A. We knew nothing about it; we received it for what it purported to be.

Q. 159. Now, is it customary in such cases as you have testified that these certificates of deposit shall be made to the order of the officer of the bank or the order of the person from whom the money is to be borrowed?

A. May I look at other certificates from other banks which we have here at present, in order to be certain?

Q. 160. Yes, certainly.

A. (After looking.) I have run over several which we have from other banks, and they are made out in various ways; sometimes made by so and so, namely, one of the officers of the bank, but not describing him as an officer, payable to the order of the Chemical national bank; sometimes they state the Chemical national bank has deposited so much to the order of W. J. Quinlan, Jr., cashier, but when these certificates of deposit come, we don't criticise them closely;

we virtually care nothing about it; we know their object; their object is, as I have already stated, to borrow the money, but not to make it appear on their books as a loan, having the double object in view to swell their deposits and not to have to report a loan, and hence we don't criticise the phraseology of the certificates.

Q. 161. Did you make any inquiry at all as to the ownership of this certificate, or the manner in which it had been issued?

A. None whatever.

Q. 162. Was there any action of the bank directors or committee upon this loan?

A. In this bank?

45 Q. 163. Yes, sir.

A. No, sir; excepting the president and myself; excepting this, that occasionally, two or three times a week, the directors will come in and check up our loan book and our discount book with their initials, stating that they had approved what the president and cashier had done. We have a board meeting but once a month. The board, of course, ratified our action in checking the book.

Q. 164. Then this loan originally was simply acted upon by the president and cashier?

A. It was, as is customary in this bank.

Q. 165. Did you examine critically the collaterals which you received at the same time?

A. We examined them.

Q. 166. Had you any knowledge as to the responsibility of the parties to those collaterals?

A. We thought we had; we knew several of them by name well.

Q. 167. That is, the makers of the collaterals?

A. That is, the makers of the collaterals.

Q. 168. Did you notice anything at that time on the collaterals to indicate the persons to whom they belonged?

A. We did not; we supposed they were the property of the Fidelity national bank, as the letter purports which enclosed them.

Q. 169. But you did not notice anything upon the paper that would indicate that they did belong to the Fidelity national bank.

A. I did not examine them with that object in view.

Q. 170. Well, did you notice anything?

A. No, sir.

Q. 171. Did you make any inquiry in regard to the collaterals at all?

A. None whatever; never do, unless we have doubts as to the strength of the paper.

Q. 172. You state that the collaterals of March and of June were all massed?

A. We treated them as a whole.

Q. 173. Do you mean that they were placed together in one package?

A. They were kept distinct, so that there would be no question as to the date of receipt.

Q. 174. Then what you mean by massing them is, that when paid they went into the one account?

A. They went into the general collateral account.

Q. 175. There was no other massing except the manner in which they were credited after being paid?

A. There was no other massing possible, was there?

46 Q. 176. You are answering the question. Was this done until after the failure of the Fidelity national bank?

A. The collateral account was not opened until July 6, 1887, when the first note matured and was paid.

Q. 177. Then there was no massing of either the collateral or the loans in any way until after the failure of the Fidelity?

A. We treated them in our minds as a whole loan—as a total amount loaned against a total amount of collaterals; in fact, the loan and all the subsequent advances would never have been made had it not been that we supposed we had a lien on all the collaterals for all the loans.

Q. 178. Now, was there any massing of either the collaterals or the loans until after the failure of the Fidelity?

A. I think I have answered the question.

Q. 179. I don't think you have; you can answer categorically whether there was or not?

A. I don't know that I can answer it more fully than I have already stated, that the collaterals were kept in separate packages for convenience, and that the collateral account was not opened until July 6, namely, when the first paid note was placed to the credit; the collateral account couldn't be opened before there was a credit. If I knew just exactly what you wanted to get at, Mr. Herron, I would answer it more specifically.

Q. 180. Then the only massing prior to that time was in your mind, was it not?

A. Yes, and we treated it, in fact, we considered it so.

Q. 181. Give us any facts that appear on your books or in your letters or anything else, showing that you treated them as one?

A. I have already stated that the second loan and subsequent advances wouldn't have been made, except upon the supposition that we had a banker's lien upon any and all collaterals.

Q. 182. Was that supposition expressed in any letter to the Fidelity bank or any of its officers or otherwise?

A. It was expressed in a letter from Mr. Williams, written by him personally, of which no copy was taken, and which letter Mr. Armstrong has said has never come to light.

Q. 183. Is that the letter, about which Mr. Williams testified in his examination in the case of the United States circuit court in New York?

A. That is the letter to which he referred.

Q. 184. Did you at any time indicate to Mr. Armstrong, the receiver of the Fidelity, that you intended to mass the collaterals and loan as one?

47 A. Allow me to look at my private letter book and see whether I did; I don't know; I presume I did. (After referring), in my special letter book I find no copy of any letter.

Q. 185. Have you any recollection of any notice to Mr. Armstrong of such a claim?

A. No distinct recollection as to day and date, but the presumption is that I did, because it was clearly in our minds here that we felt that way.

Q. 186. Well, I was not asking for presumption; I was asking as to your recollection, Mr. Quinlan. Have you any recollection at all of writing any such letter?

A. No distinct recollection.

Q. 187. And you find no copy of any such letter on your books?

A. I find no copy, no, sir.

Q. 188. You never testified before in the case in the United States circuit court in New York of any such notice, did you?

A. No, I think not; I don't think the question was ever put.

Q. 189. What reason did you give for not presenting for payment the note of J. W. Wilshire, endorsed by J. V. Lewis? I mean in your testimony here?

A. Owing to the receipt of a letter along about May 21, 22 and 23, from the Fidelity national bank, asking us not to present the collateral paper, that would be provided for at the other end.

Q. 190. This note didn't mature for more than a month after the Fidelity had failed, did it?

A. It matured June 28th.

Q. 191. Now, that letter requested you to return the note to Cincinnati, did it not?

A. It did (reading from letter): "Will want all returned here without presenting, as we advised parties to arrange payment here."

Q. 192. Now, did you return it to Cincinnati?

A. The twenty-eighth of the month came and it was not returned, and that night I discovered it, and wired Wilshire and Lewis at the address, where I supposed he (they) could be found—namely, Cincinnati—as to the fact that the note was held.

Q. 193. The note was payable actually in Cincinnati, was it?

A. It was.

Q. 194. Now, is it not a fact, Mr. Quinlan, that the real reason why the note was not presented for payment, was that you overlooked it altogether?

48 A. The loans were in the hands of the loan clerk; he did not call my attention to the note, but he was acting upon the presumption that this was authority; and it so happened that this afternoon I had some time, and I got out the papers and ran them over, and was more than surprised to find this piece of paper on hand; there is the whole story; and I at once—it was then about half past four—did my duty as an officer of the bank, and notified the parties. There is the whole thing.

Q. 195. Then the loan clerk neglected to return this paper to Cincinnati, as directed by that letter, if the letter was the authority.

A. He did not return it; it sometimes happens in cases of this kind that notes are not returned in time to reach the place of payment.

Q. 196. When did you ascertain that the Fidelity bank failed?

A. I think on the twenty-first of June, the twenty-first or the twenty-second.

Q. 197. On what day were you first garnisheed by the Montreal bank, in a suit brought by it against the Fidelity?

A. On the 18th.

Q. 198. What was the amount of that suit?

A. $200,000.

A. 199. When and from whom did you first learn that this paper sent to you as collateral for this loan did not belong to the Fidelity national bank?

A. I think from Mr. Armstrong, when I saw him in Cincinnati; at any rate, I got some of the facts from him, it must be in the early part of December, 1887.

Q. 200. Has the account between your bank and the Fidelity been closed on your books, and in what way?

A. The account was closed when we sent a check to Receiver Armstrong for the balance, namely, $33,809.89, November 26, 1887, but of course, when he compelled us to account to him for the collaterals received in June, 1887, we had again to open an account, placing it upon what we call the general ledger—not upon the bank ledger.

Q. 201. Did you open such an account?

A. We opened that account.

Q. 202. Have you got that account here?

A. Yes (producing account).

Q. 203. Will you please read the account as it stands now on your country ledger, giving each item debit and credit since the closing of the account about which you have just testified on November 26, 1887?

49 A. I hereto attach a copy of that account.

Account referred to is offered in evidence on behalf of defendant, and marked Defendant's Exhibit 11, March 12, 1891. J. A. S., ex'r.

The WITNESS: On May 22, 1890, we debited the account of receiver of Fidelity National Bank of Cincinnati, $272,796.07, being the amount paid S. A. Walker, solicitor, payment made under decree of Judge Wallace; on May 22, 1890, we credited the same account $47,796.07, for which we received nothing, the same having been debited to profit and loss previously; on June 17, we received cash from David Armstrong, receiver, on account of Champion Machine Company, $4,481.49, and bonds of the Champion Machine Company, $5,800; on the same date, June 17, bonds of Whitely, Fassler & Kelly, $9,600; and on December 31, 1890, we credited the receiver of the Fidelity national bank, $50,000, charging profit and loss?

Q. 204. Attach also to your answer a copy of the same account from the general ledger, signed in the name of receiver of the Fidelity national bank?

The account referred to is offered in evidence on behalf of defendant, and marked Defendant's Exhibit 12, March 12, 1891, J. A. S., ex'r.

Q. 205. The 272,000 and odd dollars charged in the account, about which you have just testified, embraces the interest on the amount decreed to the receiver from the time the collections were made until the time when the payment was made, does it not?

A. Yes, sir.

Q. 206. What was the balance of interest between the debit and credit sides of the account?

A. $35,224.31, and in addition there was interest from May 7th to May 27th.

Q. 207. Are all the balance of the collaterals remitted to you on March 2, the payment of which have not been credited in this account, still held by the Chemical national bank?

A. Yes, or by our representative, Mr. Worthington.

Q. 208. Have any other sums been received on account of that collateral, except the sums which are credited in this account?

A. None whatever.

Redirect Examination by *Mr. Quinlin.*

By Mr. JONES:

Q. 209. Do you know anything about the value of the bonds of the Champion Machine Company?

A. No, sir; I think they have not very much value at the present moment.

50 Q. 210. How as to the value of the Whitely, Fassler & Kelly bonds?

A. Still less.

Q. 211. They have no market value, so far as you know, either of them?

A. No, sir; I do not know of any market value.

Q. 212. You have referred in a part of your testimony to entries in your call-loan book, and have spoken of the proceeds of collaterals collected up to August 25, 1887; what part of the proceeds was from June collaterals?

A. $252,046.60.

Q. 213. And afterwards, as I understand, you were compelled to account for the proceds of the June collaterals to the receiver.

A. We were, sir.

Q. 214. In a suit which he brought against the bank?

A. Yes, sir.

Q. 215. The account of the receiver as it stands upon your books has been referred to and the schedules annexed; state as a matter of fact how much money you have received on account of that loan of $300,000.

A. That $75,000 from Lewis and $4,481.49 from the receiver.

Q. 216. Were those sums, with the bonds of the Champion Company and the bonds of Whitely, Fassler & Co., all that you have received on account of the collaterals delivered to you in March and May, 1887?

A. Yes, sir; all.

Q. 217. That is all the cash that has been paid to you on those collaterals?

A. Yes, sir.

Q. 218. Did you know anything about the ownership of the collaterals enclosed in the letters of February 28 and May 21, 1887, except the fact that they came to you enclosed in letters from the Fidelity national bank?

A. No, nothing else.

Q. 220. You persumed they belonged to the bank at that time?

A. Certainly; I had no reason to think otherwise.

It is agreed that the Chemical national bank has entered suit against John V. Lewis upon the unpaid note of J. W. Wilshire, endorsed by Lewis, for $25,000, in the superior court of the city of New York; that Lewis has appeared and answered, and that the testimony is being taken in Ohio.

Recross by Mr. HERRON:

Q 221. Mr. Quinlan, you stated that the bank held other paper of J. V. Lewis besides the four notes; what paper was
51 that?

A. We held a note of J. V. Lewis, endorsed by Wilshire, Eckert & Co. and J. Wilshire, for $25,000, due August 20, 1887. We held one of J. V. Lewis, endorsed by J. W. Wilshire, for $25,000, due September 21.

Q. 222. On what account were those notes received by the Chemcal national bank?

A. In the June collaterals.

WM. J. QUINLAN, JR.

Subscribed and sworn to before me this 16th day of March, 1891.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

Deposition of Geo. G. Williams.

GEORGE G. WILLIAMS, of lawful age, being by me first duly cautioned and sworn as a witness on behalf of the plaintiff, deposes as follows:

By Mr. JONES:

Q. 1. You are the president of the Chemical national bank?

A. I am.

Q. 2. And have been for how long?

A. Going on thirteen years.

Q. 3. I show you Plaintiff's Exhibit 1; please state whether you recollect seeing that before?

A. Oh, yes; I remember that.

Q. 4. Do you remember that there were enclosures in it of a certificate of deposit and notes?

A. Yes, sir; a certificate for $300,000 and notes.

Q. 5. What was done upon the receipt of that letter and the enclosures by the Chemical bank?

A. Well, Mr. Quinlan and I talked it over and finally agreed to make the loan.

Q. 6. Of how much?

A. Three hundred thousand dollars.

Q. 7. On what day was it made, Mr. Williams?

A. The second of March.

Q. 8. State what, if anything, you know in reference to the ownership of the notes mentioned in the exhibits?

A. I had no knowledge further than that they came to us from the Fidelity national bank, and we knew of no other ownership in them.

Q. 9. And you inferred from that that they belonged to
52 the Fidelity national bank?

A. Yes.

Q. 10. Did you know or have any notice that any other person than the Fidelity national bank had anything to do with this loan?

A. None whatever.

Q. 11. And you did not see Mr. Harper personally about it?

A. No, sir; I never saw him but once in my life.

Q. 12. You recollect generally of the fact that there were collaterals afterwards which were substituted for some mentioned in Exhibit No. 1?

A. Yes, sir.

Q. 13. Did you afterwards, in June, receive a large amount of collateral paper from the Fidelity national bank?

A. We did.

Q. 14. Amounting to how much?

A. About a million or more.

Q. 15. On what theory did the bank act in respect to all of the collaterals received—in respect to its right to apply the proceeds of the collaterals in payment?

Objected to as incompetent.

A. I supposed that they were secured for loans or advances to the Fidelity bank.

The answer is objected to as incompetent.

Q. 16. Did the bank act upon that theory until the receiver brought his suit?

Objected to as incompetent.

A. Yes.

Cross-examination of Geo. G. Williams.

By Mr. HERRON:

Q. 17. How long have you been engaged in the business of banking, Mr. Williams?

A. Fifty years next December.

Q. 18. When these collaterals were received, did you examine them personally?

A. I did.

Q. 19. You saw the certificate of deposit?

A. I did.

Q. 20. And you saw also the collateral bills receivable?

A. I did.

Q. 21. Had there been any previous correspondence with Mr. Harper in reference to this loan?

A. My impression is that he had written about a loan at a low rate of interest; he speaks about it in that letter.

Q. 22. Could you tell from the certificate of deposit whom it belonged to?

53 A. I supposed it belonged to the bank; I had no reason to suppose otherwise.

Q. 23. Did the language of the paper indicate the ownership in the bank of that certificate of deposit?

A. The ownership of it was clear from its having been transmitted to us by the proper officer of the bank.

Q 24. What, then, did you suppose, when you received that, your certificate of deposit represented?

A. I supposed it represented a loan.

Q. 25. From whom?

A. From the Fidelity national bank.

Q. 26. To whom?

A. From the Chemical bank to the Fidelity bank.

Q. 27. Is it customary, on banks discounting paper, to indicate on it the fact that it is discounted paper?

A. We do on ours. Hold on—let me see. We used to put a stamp on, but we have omitted it of late—for some years. We used to put a stamp of "D," or some mark, but have omitted it of late years.

Q. 28. The question was, whether it was not the general custom among banks?

A. I don't know; I think some do and some do not.

Q. 29. Is it not customary to put a number on indicating the number of the discount?

A. No; number of the note we put on, not the number of the discount.

Q. 30. It is customary, then, to put on it the number of the note?

A. The book usually has a number on it, and the discount note is numbered, but the collateral is not numbered; a collateral note has no number on it to indicate that it is different from an ordinary note.

Q. 31. But when a note is discounted at your bank, there is a number put on that is different from ordinary collection paper?

A. A note discounted is numbered, but a collateral note is not.

Q. 32. My question is, if the discounted paper has a number on it indicating that it is a discounted note?

A. No, it does not indicate that it is a discounted note; it has a number by which we can refer from the note to the book; look at

the note and see the number, and then we can refer to it on our book; that is all.

Q. 33. Did you place any such number on collection paper?

A. We did on city collection notes, but not on country collection notes.

Q. 34. What book did you refer to in the question before the last, as to numbers agreeing?

54 A. It is an offering book, where notes are registered when they are discounted.

Q. 35. And then a number is given to each note on that book and the same number placed on the note?

A. On city notes, yes.

Q. 36. On discounted notes; I am not asking about collection, but discounted notes now.

A. I would like to go and see whether we do it on country notes as well as on city; we do on city notes, but I will just see what the clerk does, because that is purely clerical. (After referring.) You asked me in regard to putting the marks on the notes; I find that we used to put a mark on all the notes, but we don't do it now; we put a mark simply on the country notes. For instance, that is a country mark and is marked with a "D" (producing note).

Q. 37. Is that a collateral note or a discount?

A. No, it (is) a discount note; that is merely to distinguish them when we send them away in the mail. Now this is a city note (producing note), and is merely marked with a number and with the due date up there.

Q. 38. Then I understand, in city paper, when you discount it, you put on the back of it a number and the date when due in red ink?

A. Yes, sir.

Q. 39. Had the papers sent you by the Fidelity national bank as collateral any such mark on any of them?

A. I don't know; I didn't look at it.

Q. 40. How much did you look at the paper?

A. I looked at the security mainly.

Q. 41. What do you mean by the security?

A. The character of the note.

Q. 42. You mean the makers of the notes?

A. The makers and endorsers.

Q. 43. Do you remember who were the makers and endorsers of the notes at all?

A. I remember some of them.

Q. 44. Do you mean makers or endorsers?

A. Both.

Q. 45. Who were endorsers of any of that paper?

A. J. V. Lewis.

Q. 46. Any others?

A. I don't remember any others.

Q. 47. When you receive paper as collateral on a loan is it usual to require the party to whom the loan is made to endorse it?

A. No, sir.

Q. 48. Was any of this paper endorsed by the Fidelity national bank?

55 A. I don't remember that it was.

Q. 49. Did you make any inquiry at all in regard to this paper at the time the loan was made?

A. Wilshire and Lewis were both depositors with us, and I canvassed their credits so far as I could, in talking with Mr. Quinlan; that is all.

Q. 50. Had the Fidelity national bank ever borrowed any money of the Chemical prior to that time?

A. I think not; this was the first loan so far as I remember.

Q. 51. Then you did not regard this certificate of deposit as one usually issued by a bank, but simply as an acknowledgment of indebtedness to your bank?

A. I regarded it as a loan in place of a note—as evidence of a loan in place of a note, which is common with banks borrowing here.

Q. 52. When banks borrow from you on certificates of deposit, how are these certificates usually drawn?

A. They are signed by the cashier; we don't scrutinize the rest of it.

Q. 53. In whose favor are they usually drawn?

A. I should say they would be drawn in favor of the Chemical bank, but we don't look at that.

G. G. WILLIAMS.

Subscribed and sworn to before me this sixteenth day of March, 1891.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

Adjourned to Friday, March 13, 1891, at 10.30 a. m.

Notary's Certificate.

UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

United States Circuit Court, Southern District of Ohio, Western Division.

CHEMICAL NATIONAL BANK, Plaintiff,
vs.
DAVID ARMSTRONG, as Receiver of the Fidelity National Bank, Defendant. } No. 4339.

I, John A. Shields, United States commissioner duly ap-
56 pointed by the circuit court of the United States for the southern district of New York, hereby certify that on the days indicated in the foregoing depositions at the office of the Chemical national bank, 270 Broadway, in the city of New York, I was attended by Charles Jones, Esq., of counsel for plaintiff, and by John W. Herron, Esq., of counsel for defendant, and by the witnesses, Wm. J.

Quinlan, Jr., and George G. Williams; that the said witnesses, who were of sound mind and lawful age, were by me carefully examined and cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the within-entitled cause, and gave their testimony, which, upon consent of counsel for the respective parties, was taken down by a stenographer appointed by me for that purpose, and the stenographic notes of the testimony having been reduced to writing by a typewriter, and the same having been read over by the respective witnesses, they severally said which and swore to the same in my presence.

I further certify that the reason for taking the foregoing depositions is that the witnesses are material and necessary in the cause in the caption of the said depositions named, and that they live at a greater distance than one hundred miles from the place of trial of the within-entitled cause.

I further certify that a notification of the time and place of taking the said depositions signed by Wm. Worthington, solicitor for plaintiff, was made out and served on John W. Herron, attorney for defendant, as appears from said notice which is hereto annexed.

And I do further certify that I am not of counsel and attorney for either of the parties in the said depositions and captions named, nor in any way interested in the event of the cause named in said caption.

In testimony whereof I have hereunto set my hand and seal this eighteenth day of March, A. D. 1891, and of the Independence of the United States the one hundred and fifteenth.

JOHN A. SHIELDS,
United States Commissioner Duly Appointed by the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

[SEAL.]

Depositions of sundry witnesses, taken before me, Albert Schwartz, a notary public within and for the county of Hamilton, State
57 of Ohio, pursuant to the annexed notice and at the time and place therein specified, to be read in evidence on behalf of the plaintiff in an action pending in the circuit court of the United States, southern district of Ohio, western division, in which The Chemical National Bank is plaintiff and David Armstrong, receiver of the Fidelity national bank, is defendant, Wm. Worthington being present on behalf of plaintiff and John W. Herron on behalf of defendant.

Deposition of Joseph W. Wilshire.

JOSEPH W. WILSHIRE, of lawful age, being by me first duly cautioned and sworn, deposes and says as follows:

By WM. WORTHINGTON, Esq.:

Q. 1. State your name, age and place of residence?

A. Joseph W. Wilshire; 46 years of age; engaged in the manufacture of ice; residence, Cincinnati, Ohio.

Q. 2. Do you recollect the making of four promissory notes in February, 1887, drawn by you to the order of John V. Lewis, each for the sum of $25,000.

A. Yes, sir.

Q. 3. State the circumstances under which these notes were made and what consideration was paid to you or John V. Lewis to your knowledge for them, and at what times, as nearly as you can recall, the notes matured?

A. In the latter part of February, 1887, Mr. E. L. Harper, vice-president of the Fidelity national bank, asked me if it would be convenient to have a meeting at my residence on Oak street, Mt. Auburn, between Mr. Lewis, Mr. Harper and myself. I said that it was, and along about eight o'clock in the evening of the twenty-fifth of February, I think it was, as I remmember it, Mr. E. L. Harper and Mr. John V. Lewis met at my residence on Oak street. After a conversation between Mr. Lewis and Mr. Harper—the result of that conversation was that we executed four notes of $25,000 each. As I remember it now, I was the maker of the notes to the order of Mr. John V. Lewis, and he then and there became the endorser. The notes were then placed into the hands of Mr. E. L. Harper, and he took them from the house.

Q. 4. What consideration, if any, was paid to you by Mr. Lewis or Mr. Harper for drawing the notes, or by Mr. Harper to Mr. Lewis for endorsing and delivering them to him?

A. There was no consideration whatever paid to me.
58 Whatever arrangements there may have been between Mr. Harper and Mr. Lewis, I know nothing of; there was nothing to my knowledge.

Q. 5. What conversation took place between Mr. Lewis and Mr. Harper at that time, within your hearing, in reference to these notes?

A. I don't know that I could state the details of the conversation that took place. I could give my recollection of it in substance, which was to the effect that Mr. Harper required additional funds to carry on a certain deal which he was carrying on at that time through the firm of Wilshire, Eckert & Co., his brokers; he further stated that it was inconvenient, or that he did not have the amount of ready money at hand, but that he could use paper, discounted either in his own bank or elsewhere, to get this money, and as I understood it at that time, the notes were made for that purpose, the understanding being that the notes were to be discounted, and the proceeds placed to the credit of Wilshire, Eckert & Co., to be used as occasion might require, from time to time, to margin the deals that Mr. E. L. Harper was then carrying through the firm of Wilshire, Eckert & Co., in Chicago.

Q. 6. What, if anything, was said as to who was to take up the notes at maturity?

A. I don't remember of anything being said on that point at all.

Q. 7. What, if anything, was said upon the subject of what consideration, if any, John V. Lewis was to have for endorsing the notes?

A. I heard nothing at all in regard to that point.

Q. 8. What interest, if any, did John V. Lewis have in the deal which you have spoken of as being conducted through Wilshire, Eckert & Co?

A. Nothing, to my knowledge; no interest whatever.

Q. 9. Did Mr. Harper take the notes away with him when he left your house?

A. Yes, sir.

Q. 10. Were you a member of the firm of Wilshire, Eckert & Co?

A. Yes, sir.

Q. 11. Have you stated all that you recollect as to what was said, or was done, on that occasion?

A. All that I recollect; yes, sir.

Q. 12. Do you recollect for what period of time the notes ran?

A. My impression is, three, four, five and six months.

Q. 13. Did you give any other notes maturing at intervals of three, four, five and six months, after February 25, 1887, drawn by you to the order of John V. Lewis, for the sum of $25,000?

59 A. Yes, sir; let me think about it; there were other notes given at that time, but I can't recollect how many were given, or who the maker and who the endorser was, but I have among my papers a memorandum to that effect, which I presume I can get; but I remember whatever the notes were, they were in the possession at the time of John V. Lewis.

Q. 14. That whatever which notes were?

A. Whatever these other notes were that were given, as I remember were in the hands of John V. Lewis.

By consent, the further taking of the depositions was adjourned to tomorrow, May 2nd, at 9 o'clock, a. m.

MAY 2ND, 1891.

Q. 15. Mr. Wilshire, have you examined, since the adjournment, to see whether there were any other notes given by you to the order of John V. Lewis for the sum of $25,000, maturing upon the twenty-eighth day of June, 1887?

A. Yes, sir; I have examined my memorandum.

Q. 16. With what result?

A. And find that there were none; no others,

Q. 17. Were the proceeds of the four notes which you have spoken of as having been made on February 25th, by yourself to the order of Lewis, or of any of those notes, ever placed to the credit of Wilshire, Eckert & Co.?

A. Not to my knowledge.

Q. 18. Are you familiar with the books of Wilshire, Eckert & Co.?

A. Yes, sir.

Cross-examination of Joseph W. Wilshire.

By Mr. J. W. HERRON, Esq.:

Q. 19. How long had you known Mr. John V. Lewis, at that time?

A. For seven or eight years.

Q. 20. What business relations existed between you and him, or your firm and him?

A. Mr. Lewis frequently, or not frequently, occasionally gave us orders to buy grain for him in New York and St. Louis.

Q. 21. Was not Mr. Lewis in the habit, or had he not been for several years, of speculating in wheat or grain?

A. He had given us orders to buy grain through all the seven or eight years I knew him.

Q. 22. Do you know whether he bought through other firms during that time?

A. No, sir.

60 Q. 23. Had you never talked to him about it?

A. Well, he conversed with me in regard to his business. I don't remember of his ever citing any case in which he bought through other firms, in regard to grain or stocks.

Q. 24. Do you know that he had dealt—speculated—in grain or wheat in connection with Mr. Harper?

A. No, sir; I did not.

Q. 25. Did you never hear Mr. Lewis speak of—speak of his connection with Harper in grain speculation?

A. No, sir; never.

Q. 26. Don't your books show that Mr. Lewis was at that time connected with Mr. Harper in the purchase of wheat?

A. No, sir; not to my knowledge.

Q. 27. Where are the books of Wilshire, Eckert & Co.?

A. Last, when I saw them they were in the hands of Mr. Baker.

Q. 28. Did you ever examine them with reference to that point; as to Mr. Lewis' connection with Mr. Harper's dealing?

A. Never made any careful examination in regard to the deal book, or memorandum of deals; Mr. Eckert kept that entirely, but I have looked over it frequently.

Q. 29. During the time which these notes had to run, did you carry wheat for Mr. Lewis?

A. My impression is that we were carrying some wheat for him.

Q. 30. Have you any impressions as to what amount?

A. I cannot say as to the amount.

Q. 31. At the time you were carrying wheat for Mr. Harper?

A. Yes, sir.

Q. 32. How did it come that Mr. Harper made the appointment with Mr. Lewis to meet you at the time you speak of?

A. That I don't know.

Q. 33. Did he state when he asked to have the meeting with Mr. Lewis, what the object of the meeting was to be?

A. No, sir; I don't know that he did. The time he made the

appointment, or asked me if it would be convenient, was between the hours of one and two, when I went in to make my deposit in the bank. He was very busy and he just said—he asked me if it would be convenient for him and Mr. Lewis to meet me at my house and talk over the matters. I said it would.

Q. 34. He stated nothing else except to talk over matters?

A. That is as I remember it.

61 Q. 35. Didn't he say what matters he desired to talk over?

A. I don't know; the result of the conversation was that those papers were executed.

Q. 36. Didn't you know that it was to talk over matters connected with the wheat deal?

Objected to by Mr. Worthington, Esq., attorney for plaintiff.

A. I may have presumed it was for that purpose, because I had no other business with Mr. Harper.

Q. 37. You had no other business with Mr. Harper except for the purchase of wheat for him?

A. That was all.

Q. 38. Was Mr. Lewis living here at that time?

A. No, sir; I think not.

Q. 39. Where was he living?

A. His house—he had a house here, but he was not occupying it, and he was in the east; as I remember it, he was traveling about, sometimes voyaging in his yacht, and at others in Boston or New York. I don't know where he was living.

Q. 40. How long before this had you seen him—before the interview?

A. I can't remember. I saw him from time to time on 'change.

Q. 41. Had you seen him immediately before?

A. Possibly I might; I cannot remember.

Q. 42. Had he said anything to you about coming to see you on this subject?

A. Not that I remember of.

Q. 43. When they came out to your house, who did the talking, Mr. Harper or Mr. Lewis?

A. Mr. Harper took the initiate.

Q. 44. What was the subject of his conversation, was it the purchase of wheat or the condition of the state of the market?

A. Yes, sir; Mr. Harper spoke of the condition of the market, the favorable outlook, but at the same time the necessity of having ample money to protect the deals.

Q. 45. What did Mr. Lewis say about it?

A. I don't remember the conversation; my recollection of the matter is that he said very little, but he raised no objections.

Q. 46. Did he speak anything at all about the condition of the market and the prospect of the wheat market?

A. I don't remember. Did you ask me whether I had any

62 conversation with Mr. Lewis in regard to this matter previous to going out there?

Q. 47. Yes.

A. I did have.

Q. 48. State what conversation you had with Mr. Lewis about this matter before he came out there?

A. I stated to Mr. Lewis when I went to see him—no, I met him on 'change as I went back at nearly half past one.

Q. 49. Was this after you had met Mr. Harper at the bank?

A. Yes, sir. I told Mr. Lewis what Mr. Harper had requested me to say to him, merely to meet at the house, to talk over the matter. I told him that Mr. Harper had made the remark to some others, and I understood that he had made it to him, that this wheat was my own, referring to me, and that I wanted him to understand distinctly that whatever conversation took place there, or whatever statement Harper would make, that I had nothing to do with (it), except as a broker; he being an old friend of mine; that it was Mr. Harper's affair, and not my own. I had an idea at that time that Mr. Harper may have intimated to him something different, so I told Mr. Lewis that he might be prepared to know that if he was accommodating anybody, it was not me, but it was Mr. Harper.

Q. 50. What did Mr. Lewis say?

A. He gave me to understand that he understood it thoroughly; that he understood that that was the conversation.

Q. 51. Was that the same day they came out to your house?

A. Yes, sir.

Q. 52. Was that all that Mr. Lewis said at that time about the wheat matters?

A. All that I remember of.

Q. 53. Did you speak to him about what the object of the meeting was to be?

A. No. I told him exactly what Mr. Harper had said to me; whether Mr. Harper had said anything to him or not I don't know.

Q. 54. Did he say anything about Mr. Harper having had a conversation upon the subject?

A. No. He made no remark; he did say that he was not very well, not able to go out, especially did not want to go out in the night air, but that he would be there.

Q. 55. What was the agreement or understanding between Mr. Lewis who was to pay these notes, as to you and him?

63 A. There was no agreement or understanding. My impression at the time of the conversation was that these notes were made that Mr. Harper was to take care of them; he was able to take care of them.

Q. 56. Mr. Harper's name didn't appear on the paper at all?

A. No, sir.

Q. 57. Who prepared the notes?

A. I am unable to say exactly, but my impression is that I did.

Q. 58. The notes are in your handwriting, are they?

A. My impression is that they are; I am not sure as to that.

Q. 59. Were they endorsed by Mr. Lewis at that time?

A. Yes, sir.

Q. 60. Was there anything said about your paying these notes at that time?

A. No, sir; there was not.

Q. 61. Was there anything said about you not paying them, that you were not to pay the notes?

A. No, sir.

Q. 62. Now state exactly what Mr. Harper did say in your presence about the notes?

A. Well, I can't recollect what he did say, or even the substance of the conversation that took place; they were not there but a very short time. The conversation before the paper was made was of a very short duration, and they were not there an hour at the house, and, as I remember it, the substance of the conversation was to this effect, that while this wheat deal was very successful, and the prospects were of a successful termination, yet with the opposition that existed there in Chicago, it was best to be prepared to furnish additional margin, ready when called for, and while the money was not needed then, possibly it might be later on, and that Mr. Harper wanted to be prepared for it; but he wanted to have it, so that he could use it in case he was called upon for additional money. The notes were delivered to him, he put them in his pocket and left the house; and this is the last I ever saw of them.

Q. 63. Were the notes endorsed by Lewis before they were delivered to Harper?

A. Yes, sir.

Q. 64. What other notes were given and signed by you and Mr. Lewis at that time—at that date is what I speak of now?

A. No other notes.

Q. 65. Were there other notes signed by you and Lewis?

64 Objected to by Wm. Worthington, attorney for plaintiff.

A. On February 14 and February 17, 1887.

Q. 66. What notes were given then?

A. Ninety days—John V. Lewis to J. W. Wilshire, $25,000; four months note to J. V. Lewis, $25,000, that was on February 14. On February 17, five months to John V. Lewis for $25,000, and a six-months' note for $25,000.

Q. 67. Were not these notes all signed at the same time?

A. No, sir; I don't think they were—which notes?

Q. 68. Were not these four notes signed at the same time?

A. I don't remember as to that, sir.

Q. 69. Do you remember when these notes were signed?

A. No, sir; I don't.

Q. 70. Were these notes given to Mr. Harper, too?

A. I don't remember that. I do remember, of course, that these notes were not a part of the transaction on the evening of February 25th.

Q. 71. For what purpose were those four notes given?

Objected to by Wm. Worthington, counsel for plaintiff.

A. Given for the same purpose that the others were, as I understand it, on February 25th.

Q. 72. Do you remember at all the circumstances under which these notes were given?

A. I don't.

Q. 73. Did you receive the proceeds of these four notes—your firm?

A. I can't say exactly now, but my impression is that one or two of them was discounted.

Q. 74. By whom?

A. Discounted and placed to the credit of Wilshire, Eckert & Co., discounted in the Fidelity national bank.

Q. 75. And placed to your credit?

A. Yes, sir.

Q. 76. Do they appear on your books at all, these notes?

A. If they were discounted by us, they do.

Q. 77. Well, can you refer to the books of Wilshire, Eckert & Co., and see whether these four last-mentioned notes appear on your books or not?

A. Yes, sir—you mean those four last notes of February 14th and 17th?

Q. 78. Yes, sir.

A. I will find that out.

65 Q. 79. Will you find out the dates at which they were entered on your books?

A. Yes, sir; I will.

Q. 80. Now, for whose accommodation did you endorse those four notes?

Objected to by Wm. Worthington, counsel for plaintiff.

A. For Mr. Harper's.

Q. 81. Do you know the reason Mr. Lewis executed those four notes as maker?

A. I don't; it is beyond me.

Q. 82. Was there no business relation existing between Mr. Harper and Mr. Lewis except such as grew out of the wheat speculation?

Objected to by counsel for plaintiff.

A. Nothing that I know of whatever. Mr. Harper was exceedingly uncommunicative to me in regard to any matter except what related to business transactions between himself and myself.

Q. 83. When did you first hear the note due June 28—of its not being paid?

A. I have no recollection of being notified of it at all.

No question or answer numbered 84 appears in the transcript.

Q. 85. Did you pay any attention at all to the payment of those four notes of which you were the maker?

A. None whatever.

Q. 86. Have you ever had any conversation since in regard to them?

Objected to by counsel for plaintiff.

A. Yes, frequently.
Q. 87. When?
A. Long—shortly after the failure of the Fidelity national bank. Mr. Lewis asked me——

Objected to by counsel for plaintiff.

Q. 88. Have you since that time?
A. Yes, sir.
Q. 89. When?
A. Well, I met him in New York, on two occasions. I met him in Philadelphia, my impressions is, let's see; I met him in Philadelphia, not by appointment, but while attending meeting of the Loyal Legion, about a year ago.
Q. 90. Is that the last time you saw him?
A. No, sir; I saw in New York last fall.
Q. 91. Was that after he had been sued upon this $25,000?
A. Yes, sir.
Q. 92. Where did you see him then?
66 A. He came to call on me in the St. James hotel.
Q. 93. What did he say about having been sued at that time upon the notes?

Objected to by counsel for plaintiff.

A. He asked me to go with him to the office of Mr. Edgar Johnson.
Q. 94. Did you go?
A. Yes, sir.
Q. 95. Was Edgar Johnson, Mr. Lewis' attorney at that time, attending to the case?
A. Yes, sir.
Q. 96. When you met Mr. Lewis in New Bedford, what was said about wheat speculation at that time?

Objected to by counsel for plaintiff.

A. I don't remember of anything having been said.
Q. 97. Did he say how much he had lost in wheat speculation?
A. I don't remember, Mr. Herron, that he did; I was considerably disturbed about that time, and my memory is not very reliable. I was there but a few hours.
Q. 98. Did he say anything about his connection with Mr. Harper in reference to wheat speculation?
A. Not that I remember of.
Q. 99. You testified in the suit against the directors, did you not; also in court, did you not?
A. Yes, sir.
Q. 100. Now, did you not testify on that occasion in the case where Mr. Harper was on trial, that Mr. Lewis was interested in the $300,000 purchase of wheat with Mr. Harper, 300,000 or 3,000,000 bushels of wheat; I don't remember what it was?
A. No, sir; my recollection of that is now that I testified about

Mr. Lewis having brought me an order from Mr. Harper to buy a million bushels of wheat; that is the only connection that I know of.

Q. 101. Well, is that so?

A. He brought me a written order from Mr. Harper.

Q. 102. When was that?

A. I don't remember the date. The circumstances of it were this: I received a telegram on 'change from one of our correspondents in Chicago, saying that if a purchase of wheat of sufficient amount were made at that time that the market would advance very considerably. Mr. Lewis was on 'change at the time, and I was in the habit of showing him and my other friends telegrams I received, and the telegram I received from Chicago was among the telegrams that I had. I showed him this one. I said I did not want
67 to go over to see Mr. Harper now; I am busy; and besides, I did not know much about this wheat. He said: "I might go over there;" and he said: "I will show him that telegram." I said, "All right, you can show it to him." Shortly after he returned with a written order signed "E. L. H.," and giving me directions how to buy it. In fact, as I remember the order, it was in the wording of a telegram I should send. Now, that is the only recollection that I have now.

Q. 103. Can you give the date of that?

A. No, sir; I can't give the date; it was in the latter part of June or first of July, 1887.

Q. 104. It could not have been that late, could it?

A. I don't know.

Q. 105. Harper failed in June. Would your books show when that million of bushels of wheat was ordered?

A. We were buying so much at that time, I don't know that it would show that particular number of bushels.

Q. 106. Have you got that order?

A. No, sir; I think it is in the hands of Mr. Lewis; I don't think he ever gave it to me.

Q. 107. Mr. Lewis kept the order, did he?

A. That is my impression; he kept it. Now I know he did, because I saw it afterwards.

Q. 108. You saw it afterwards in Mr. Lewis' possession?

A. Yes, sir.

Q. 109. Now, according to your recollection, is that all you testified to on the trial of Mr. Harper in regard to Lewis' connection with the wheat speculation?

A. That is all I remember; yes, sir.

Q. 110. How long have you read it since that time?

A. I don't know that I read it since that time at all; I know I have not.

Redirect Examination of J. W. Wilshire.

By WM. WORTHINGTON, attorney for plaintiff:

Q. 111. Mr. Wilshire, you said you did not recollect having been notified of the non-payment of the note that became due June 28th;

don't you recollect receiving a telegram of the Chemical national bank on that day, or a telegram dated that day, that the note was with them and had not been paid?

A. No, sir; I do not.

Q. 112. You were asked whether you knew of any business relations between Harper and Lewis except as to the wheat deals; do you know of any relation between them in any way with reference to wheat or grain deals at the time in February when these notes were given, other than what you have already testified to here?

68 A. I know nothing at all, sir.

Q. 113. This order that Mr. Lewis gave you from Harper, to buy a million bushels of wheat, do you recollect whether that was given before or after these notes of February 25th?

A. (Answer omitted from transcript).

Q. 114. Would an examination of your books help you to fix that, do you think?

A. I could not fix the identical transaction, I don't believe, because we got several orders to buy large amounts of wheat at that time. I remember his peculiar way of buying was to order us to buy a million bushels of wheat, for instance, and he would buy a part of it at a certain price, and a part at more; or, on the other hand, to buy it at a certain price and buy it down.

Q. 115. Do you recollect whether this order was placed to the broker from whom you received the telegram?

A. I think it was; I am almost sure of that.

Q. 116. Had you had deals with that broker prior to that time with that magnitude?

A. Yes, sir; we had. I think I can fix that particular transaction; it was written on a paper as I should word a telegram.

Q. 117. In the conversations that you have had with Mr. Lewis since this transaction—since the giving of these notes in February—has he said anything to you with reference to his being jointly interested with Mr. Harper?

A. No, sir.

Q. 118. In any of these wheat deals?

A. No, sir.

Q. 119. Did he ever say anything to you as to why he had endorsed these notes of February 25, 1887?

A. No, sir. On the other hand, he never has given me any satisfactory explanation in reply to my inquiries. I mean by that, that while he has never avoided my inquiries, I made the remark on several occasions that I never could understand why he should endorse, or make that paper, knowing him as the business man that I did. I was afraid (Mr. Lewis was a warm friend before this transaction) that Harper was using him in that way, and it was for that reason I had a talk with him previous to going out.

Q. 120. When you put that question to him, what did he say?

A. Well, he did not give any particular answer to it at all; and I expressed myself and never have been able to understand since that time—as I told him—why it was that he made this paper.

69 By Mr. HERRON:

Q. 121. And he gave you no explanation?

A. No, sir. Whatever there may have been between Mr. Harper and Mr. Lewis, I know nothing of it whatever, as there was a great many other notes on this matter of wheat; it was all new to me.

Q. 122. So far as your know, was Mr. Harper in any way interested in the wheat deals you were conducting at that time for Mr. Lewis?

A. Not that I know of; never had any reason to think so.

(There is no queston No. 123, or answer in the transcript.)

Q. 124. How large were these deals for Lewis, do you recollect, in February?

A. They were very small, and in St. Louis the larger amount of them, that is, the principal amount.

Q. 125. When you say, " very small," how much do you mean?

A. Two or three hundred thousand, perhaps, not over.

Q. 126. Two or three hundred thousand of what?

A. Bushels of grain.

Q. 127 And the margins on that would be about how much, in dollars?

A. Well, it would depend a gread deal on how long it had been running, how the market was at that time. Mr. Eckert could give you that.

By Mr. HERRON:

Q. 128. Mr. Harper and Mr. Lewis were speculating in wheat at the same iime?

A. You mean they were speculating at the same time?

By Mr. WORTHINGTON:

Q. 120 Whether they were jointly or not?

A. I don't know.

Q. 130. They were speculating on a difference in the market?

A. Yes, sir; exactly.

Q 131 Were they speculating in the same market as to place?

A. As I remember it, Mr. Lewis had some wheat, but all his deals were at the market by his cash payments into it. There was no connection in the margin of his deals and the margin of Mr. Harper's deals at all.

Q. 132. The question, whether the speculation was in the same market?

A. Mr. Harper had nothing that I now of in St. Louis at all.

70 Q. 133. Mr. Lewis had some in Chicago, did he not?

A. Yes, sir; I think he had a small amount in Chicago. If he did not have at that particular time, he had previous to that time for six or seven years given us orders.

Q. 134. I was speaking about what deals he had in February 25th?

A. Well, I could not say exactly, but my impression is that they were deals in Chicago.

Q. 135. At that time?

A. At that time; yes, sir.

Q. 136. And as to the amount?

A. I could not say.

Q. 137. Would your books show all the purchases you made for Lewis?

A. I think they would; yes, sir.

Q. 138. Well suppose you look at them.

Adjourned by *counsel* till May 6th.

On the sixth day of May, John W. Herron, Esq., Wm. Worthington, Esq., and Joseph Wilshire, Esq., being present, the taking of this deposition was resumed.

Q. 139. Since you were last upon the stand, have you examined the books of Wilshire, Eckert & Co., with reference to the things as to which you said they might refresh your memory; if so, state with what result?

A. I have examined the books and find that during the month of February and until March 26. 1887, John V. Lewis had not bought or sold any articles of merchandise through that firm; between March 26th and April 5th, Mr. Lewis bought at St. Louis 300,000 bushels of wheat for May delivery, and bought at Chicago 100,000 *bushels* (copy) of short ribs for May delivery.

I find also that the written order from Harper, which I have testified was given to me by Mr. Lewis on 'change to buy 1,000,000 bushels of wheat in Chicago, was given on the eighth day of March, 1887.

I find also that of the notes which I have testified as having been made upon the seventeenth day of February, 1887, $50,000 were discounted in the Fidelity national bank, and proceeds placed to the credit of Wilshire, Eckert & Co.

JOSEPH W. WILSHIRE.

THE STATE OF OHIO, } ss:
Hamilton County, }

I, Albert W. Schwartz, a notary public in and for the county and State above named, duly commissioned and qualified, do hereby certify that the above-named Joseph W. Wilshire, was by me first sworn to testify the truth, the whole truth, and nothing but
71 the truth, and that the deposition by him subscribed as above set forth, was by agreement taken down in shorthand and transcribed by myself, and was subscribed by said witness in my presence, and was continued from day to day, as above set forth; that said deposition was taken at the time and place specified in the notice hereto attached, and that I am not counsel, attorney or relative of either party, or otherwise interested in the event of this suit.

In testimony whereof, I have hereunto set my hand and official seal, this thirteenth day of May, A. D. 1892.

[SEAL.] ALBERT W. SCHWARTZ,
N. P., Hamilton County, Ohio.

(Directions for taking deposition omitted.)

Cost of Bill.

	Witness fees.
Writing and certifying depositions, at 20 cts. per 100 words (4,300 words)....$9 00	(At 75 cts. per day and 5 cents traveling fees, each way, if not less than one mile.).....
Total cost of taking deposition.....	$9 00

Received of William Worthington the sum of $9 in full of my fees, as above specified.

ALBERT W. SCHWARTZ,
N. P., Hamilton County, Ohio.

And afterwards, to wit, on the seventh day of October, A. D. 1891, the following deposition was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

(Instructions for taking depositions omitted.)

Depositions of sundry witnesses, taken before me, Wm. C. Herron, a notary public within and for the county of Hamilton, in the State of Ohio, pursuant to the agreement of the parties herein and at the time and place therein specified, to be read in evidence in behalf of the respondent in an action pending in circuit court of the United States, southern district of Ohio, in which the Chemical National Bank of New York is complainant and David Armstrong, receiver, etc., is respondent, William Worthington being present on behalf of respondent.

72 *Deposition of J. Harry Watters.*

United States Circuit Court, Southern District of Ohio, Western Division.

THE CHEMICAL NATIONAL BANK
vs.
DAVID ARMSTRONG, Receiver of the Fidelity National Bank.

Deposition taken on behalf of defendant, at the office of John W. Herron, Friday afternoon, three o'clock, September 25, 1891.

Present: For complainant, Judge William Worthington; for respondent, John W. Herron.

J. HARRY WATTERS, called on behalf of respondent, being first duly sworn, testifies as follows:

Direct examination by Mr. HERRON:

Q. 1. State your name, residence and occupation.
A. My name is J. Harry Watters; residence, No. 55 West Ninth

street, Cincinnati, Ohio; I am principal of Watters' Business College; I was formally book-keeper for the receiver of the Fidelity national bank.

Q. 2. State what connection, if any, you had with the Fidelity national bank, and for what length of time, if at all.

A. I was connected with the Fidelity national bank from March 1, 18—, the first day that bank opened, until the day of the failure, June 25, 1887. I was employed as general book-keeper and general utility clerk.

Q. 8. State whether you had access to the books from which the certificates of deposit were taken when issued by the Fidelity national bank.

A. I had; yes, sir.

Q. 9. State whether any certificate of deposit for three hundred thousand dollars, in favor of Edward L. Harper, dated February 28, 1887, appeared on the stubs of the certificate of deposit book.

Question objected to by counsel for complainant. Exception reserved by counsel for respondent.

A. There appears on the stub of the certificate of deposit book No. 197 a record $300,000 issued to E. L. Harper, deposited by himself, without date. This is written between a certificate No. 496 and a certificate No. 498 of dates May 17 and May 21.

Q. 10. Look at the book now shown you, and state what it is, if you know.

73 A. This is the certificate of deposit book from No. 1 to 500.

Book offered in evidence marked "Watters' Exhibit No. 1."

Q. 11. State what use was made of that book in the Fidelity national bank, and for how long a time?

Question objected to by counsel for complainant. Exception reserved by counsel for respondent.

A. From March 1 to May 17, this book, with the certificates of deposits and stubs, were used to enter a record of all certificates of deposits issued by the Fidelity national bank.

Q. 12. Was any other book used by the Fidelity national bank for that purpose?

Question objected to by counsel for complainant. Exception reserved by counsel for respondent.

A. None during this time. Afterwards another certificate of deposit book, numbering from 500 upwards, was used by the bank.

Q. 13. After what date?

A. After May 17th.

Q. 14. In whose handwriting is the entry of the stub?

A. It is in the handwriting of Miss Josephine Holmes.

Q. 15. What knowledge have you as to when that entry (on) the stub was made?

A. I do not know the exact date of the entry—the exact date that the entry was made; but about a quarter to eleven o'clock on the morning of June 20th, 1887, Mr. Eugene Powell, then national bank examiner for the State of Ohio, came to me while I was sitting at the paying teller's desk, and asked me what the record meant.

Q. 17. He showed you that record, did he?

Question objected to by counsel for complainant. Exception reserved by counsel for respondent.

A. Yes, sir.

Q. 17. Had you ever seen that record prior to that time?

A. No, sir.

Q. 19. Had you any knowledge of it at all?

A. No, sir.

Q. 20. What disposition was made of the three hundred thousand dollars credited to the Fidelity national bank by the Chemical national bank, on March 2, 1887?

Question objected to by counsel for complainant. Exception reserved by counsel for respondent.

A. I will give you, as near as I can remember, the exact transactions as they occurred on the day of March 2, 1887. Mr. Edward L. Harper, the vice-president of the Fidelity national bank, came to my desk—the general book-keeper's desk—and gave me a
74 charge ticket, asking me to please place it to his credit. I think I made out the charge ticket which was given to the receiving teller, who, in turn, entered it on the deposit book of the Fidelity, and by the individual book-keeper placed to the credit of Edward L. Harper. The charge ticket went to the general book-keeper, who, in turn, charged a like amount to the Chemical national bank.

Q. 21. Look at the paper now shown you, and state what it is.

A. This is the original deposit ticket made out by myself at the request of Mr. Edward L. Harper.

Paper offered in evidence marked "Watters' Exhibit No. 2."

Q. 22. Look at the paper attached to your deposition taken in the case between these same parties, in New York city, and state what that is.

A. This is a copy of the charge ticket which was handed to me by Mr. E. L. Harper, from which I made the original deposit ticket.

Paper offered in evidence marked "Watters' Exhibit No. 3."

Q. 23. At the time you gave your testimony in that case, had you the original of the paper before you?

A. Yes, sir; I think I had; in fact, I know I had it before me, yes, sir.

Q. 24. This is a copy of the original?

A. Yes, sir; that is an exact copy, except that there is no date on it, and I think the original charge ticket had a date on it.

Q. 25. Were any other entries made on the books of the Fidelity national bank in reference to this three hundred thousand dollar loan, except those you have described?

A. No, sir; there were none.

Q. 26. What, then, was the effect as to the disposition of this money of the entries so made?

Question objected to by counsel for complainant. Exceptions reserved by counsel for respondent.

A. Mr. Edward L. Harper received credit for three hundred thousand dollars, and the Chemical national bank was charged with this amount.

Q. 27. What paper or obligations, if anything, was given by Mr. Harper to the Fidelity national bank at that time?

Question objected to by counsel for complainant.

A. There is none that I know of.

Q. 28. Who, besides E. L. Harper, have any directions in regard to these entries?

75 Question objected to by counsel for complainant. Exception reserved by counsel for respondent.

A. Nobody.

Q. 29. What knowledge, so far as you know, had any other officers of the bank of the entries to (which) you have referred?

Question objected to by counsel for complainant. Exception reserved by counsel for respondent.

A. I can't say whether the officers were aware of the fact or not.

Q. 30. Do you know whether they did know of it or not?

A. No, sir; I do not know.

Q. 31. Had you any access to the letter books, or have you had access to the letter books of the Fidelity national bank?

A. I have, yes, sir.

Q 32. I will ask you whether you have examined those letter books, to see whether a letter from E. L. Harper to the Chemical national bank under date of February 28, 1887, enclosing a certificate of deposit for three hundred thousand dollars—certificate of deposit No. 345, was copied in any such letter book?

Question objected to by counsel for complainant. Exception reserved by counsel for respondent.

A. I did, prior to the time of giving my testimony in the case of David Armstrong, receiver of the Fidelity national bank, *vs.* The Chemical National Bank; and I did not find any record of it.

Q. 32½. Have you examined since, to see if it was there?

A. No, sir; but at the time I made the examination, I was employed in the Fidelity national bank, with the receiver, and had access

to all the books and papers, and my entire time was spent in going through them, and that letter was not copied in any of the letter books.

Q. 33. That letter was not copied in any of the books of the Fidelity bank?

A. No, sir; not in any of them.

Q. 34. State whether you have examined the list of paper which was enclosed in the letter of February 28, 1887, as to whether some of it was the property of the Fidelity national bank, and, if so, with what result?

Question objected to by counsel for complainant. Exception reserved by counsel for respondent.

A. The paper that was sent with the letter of February 28, 1887, part of it belonged to the Fidelity national bank, and part of it did not.

Copy offered of list, marked "Watters' Exhibit No. 4."

Q. 35. What part of it belonged to the Fidelity national bank, and what part did not?

76 A. Do you want the items?

Q. 36. Yes, sir.

A. The Jung Brewing Co., due June, 1887, $25,000; same, due April 24, 1887, $10,000; C. Aultman & Co., five pieces, $10,000 each, due May 16th, 20th, 23rd, 27th, and 30th; Champion Machine Company, twelve pieces, belonged to the Fidelity; the others did not.

Q. 37. State what entry was made on the books of the Fidelity national bank as to the disposition of this paper when it was sent to New York?

A. There were no entries made on the books of the Fidelity at that time.

Q. 38. What is the custom, if you know, among banks as to entries upon sending paper to another bank, under circumstances similar to these?

Question objected to by counsel for complainant. Exception reserved by counsel for respondent.

A. On the "remarks" column, in the books in which such paper would be recorded, a record would be made saying, "paper sent such and such a date, as collateral for loan of such and such an amount."

Q. 39. And you say that no such entry was made in that case?

A. No, sir.

Q. 40. Look at the list of paper, now shown you, sent to the Chemical national bank, on May 27, 1887, and state to whom that paper belonged if you know?

Copy offered, marked "Watters' Exhibit, No. 5."

A. On May 21, 1887, the paper that was sent by the Fidelity national bank to the Chemical national bank; none of it belonged to the Fidelity national bank.

Q. 41. State whether the interest which purported to have been paid on the loan was paid, and how and what entry was made on the books of the bank?

Question objected to by counsel for complainant. Exception reserved by counsel for respondent.

A. A draft was drawn on the Chemical national bank for $4,133.33 of which there was no record on the books of the Fidelity national bank.

Q. 42. Look at the letter now shown you, dated July 3, 1887, and state what it is?

A. This is a letter from the Chemical National Bank of New York City to David Armstrong, receiver of the Fidelity national bank, in which it states that Mr. J. V. Lewis has paid the note to J. W. Wilshire.

Letter offered in evidence, marked "Walters' Exhibit No. 6."

Q. 43. Was that letter received by Mr. Armstrong?

A. Yes, sir.

77 Q. 44. In the regular course of mail?

A. Yes, sir; I think I remember it.

Q. 45. Look at the paper now shown you, and state what it is?

A. A letter of advice from the Chemical national bank, dated August 24th, received by David Armstrong, receiver of the Fidelity national bank.

Letter offered in evidence, marked "Watters' Exhibit No. 7."

Q. 46. Look at the paper now shown you, and state what it is?

A. It is the account current from the Chemical national bank to the Fidelity national bank, commencing August 5, 1887.

Paper offered in evidence, marked "Watters' Exhibit No. 8."

Q. 47. Look at the paper now shown you and state what it is?

A. This is a copy of the account current of the Chemical national bank, from July 6, 1887.

Paper offered in evidence, marked "Watters' Exhibit No. 9."

It is agreed between counsel that the third letter of advice may be offered as soon as found.

Q. 48. State whether you received—or the Fidelity received—an account current April 1, 1887, in which this $300,000 appeared to the credit of the Fidelity national bank, and, if so, what conversation, if any, you had with Mr. Harper in regard to it?

Question objected to by counsel for complainant. Exception reserved by counsel for respondent.

A. I didn't have any conversation with Mr. Harper in regard to it. The account current was received by the Fidelity national bank, and turned over to me about the fourth or fifth of April. It was checked up with the books of the Fidelity national bank, and found to be O K.

Paper offered in evidence, marked "Watters' Exhibit No. 10."

Q. 49. What did you do with it then?
A. Filed it away among the paper(s) of the Fidelity national bank.

Cross-examination of J. Harry Watters.

By Judge WORTHINGTON:

Q. 50. Was Miss Josephine Holmes in the employ of the Fidelity national bank?
A. She was.
Q. 51. During what period?
A. From about the middle of April, 1886. I can tell you the exact date if you wish it.
78 Q. 52. No; that is not necessary.
A. Well, from about the middle of April, 1886, until after the failure of the bank in June, 1887.
Q. 53. What position did she hold?
A. That of exchange clerk.
Q. 54. Look at the stub of this certificate of deposit, No. 345, in the certificate of deposit book, and state what writing is upon that, and in whose handwriting?
A. The word, "canceled," is in the handwriting of Miss Josephine Holmes.
Q. 55. Can you produce the book of the Fidelity national bank containing the entries relating to the Jung Brewing Company papers in April and June, 1886?
A. (Answer omitted from transcript.)

(No answer.)

Q. 56. You spoke in your examination-in-chief of there being some book in banks in which a record was kept when paper was sent out to other banks, to indicate that the paper had been sent as collateral; what book is that?
A. The foreign bill tickler.
Q. 57. Have you examined the foreign bill tickler of the Fidelity national bank to see whether there is any memorandum at all of the Jung Brewing Company paper notes that were due in April and June?
A. Yes, sir.
Q. 58. Did you find the notes there?
A. No, sir; I found no record of the notes there. There is no record of the notes on this book.
Q. 59. Did I understand you to say that the note should appear on that book, whether it had been sent out as collateral or not?
A. Yes, sir.
Q. 60. If it had been sent out as collateral, that would appear in the memoranda, in the remark margin?
A. Yes, sir.
Q. 61. Just explain what this foreign bill tickler book is?

A. The foreign bill tickler is a record kept putting the notes that are due by the month together; and under the date of April and June there does not appear any record of this note of the Jung Brewing Company. It appears as being discounted, in the discount book of the Fidelity national bank.

Q. 62. The book, then, is a record kept by the bank of maturities which it holds?

A. Yes, sir.

Q. 63. When they sent out notes as collateral, which they owned, usually in the Fidelity national bank they made a memorandum on this tickler against that particular note; is that it?

79 A. No, sir. The question asked me by Mr. Herron was what was the custom, which I explained was that they made a marginal note of what became of the paper, but no such record was ever kept on the books of the Fidelity national bank.

Q. 64. They never did that at all?

A. No, sir.

Q. 65. So that when you spoke of that as being a custom in banks, you did not mean that that was the custom of the Fidelity national bank?

A. No, sir.

Q. 66. And they never did make any such memorandum in the Fidelity national bank?

A. No, sir.

Q. 67. Look at the foreign bill tickler, and see if you can find in it the notes of C. Aultman & Co., due in May, 1887, five pieces for $10,000 each?

A. Yes, sir; this appears under date of May, in the foreign bill tickler.

Q. 68. See if you find upon that tickler the twelve pieces of the Champion Machine Company, mentioned in the letter of the twenty-eighth of February, 1887, eight due in June, two in July and two in August, 1887?

A. I find that they are all there; yes, sir.

Q. 69. Mr. Watters, you stated something about a draft drawn on the Chemical national bank for $4,133.33; have you access to that draft?

A. I was mistaken in regard to what I said about that draft and I should like to correct it.

(Mr. Watters makes a statement later on in regard to same.)

Q. 70. The entry in this account current, which you have produced, sent by the Chemical national bank to the Fidelity national bank, for the month of March, 1887, relating to the $300,000 of which we have been speaking, reads, on the credit side, under date of March 2, "Tem. loan, $300,000," does it not?

A. It does; yes, sir.

Q. 71. This account, which has been marked "Watters' Ex. No. 8," being the Fidelity national bank in account with the Chemical national bank, the first credit entry being "July 6, 1887, $3,000.00,"

and the first debit entry being "August 5th, 1887, $6.90;" what does that purport to be on its face?

A. A list of notes pledged to the Chemical national bank, which were held by the Chemical as collateral for $300,000 loaned by the Chemical to the Fidelity; a list of fees charged for protest; transfer to——

Q. 72. Well, I don't care for all that; I just want to know what it purports to be on its face?

80 A. A list of notes pledged to the Chemical national bank, and held by it as collateral.

Q. 73. The credit entries, then, are collections made by the Chemical national bank of notes which had been pledged to it as collateral by the Fidelity national bank?

A. Yes, sir.

Q. 74. You speak of $300,000.00, that account includes, also, the figures of the June loan, does it?

A. Yes, I was about to say that when interrupted.

Q. 75. And they all appear in one account, without any separation of the collections to the credit of the particular loan for which the collateral was sent?

A. Yes, sir; all together.

Q. 76. The other account handed you by Mr. Herron, pinned to "Exhibit No. 9" headed "Dr. Fidelity national bank account with Chemical national bank" the first debit entry of which I cannot see, but the first credit entry is "July 6th, Evan Thomas, $285.00;" what does that purport to be?

A. A list of paper collected for different loans to the Fidelity national bank, charged with the balance due collateral account on the different loans made by the Chemical national bank to the Fidelity national bank.

Q. 77. The credit entries, then, upon this last exhibit, are collections by the Chemical national bank, of notes pledged to it as collateral?

A. Yes, sir; for different loans.

Mr. HERRON:

Q. 78. Well, is that all?

A. Yes, sir; that is what they are.

Judge WORTHINGTON:

Q. 79. The apparent difference upon the credit side of these two accounts of which we have been speaking just now, and in examining them in detail, is that in "Exhibit No. 8," the names are not given and in "Exhibit No. 9" they are.

A. That is it; yes, sir.

Q. 80. You stated, Mr. Watters, that you have looked through the letter book of the Fidelity national bank, to see if you could find a copy of the letter of February 28, 1887, from E. L. Harper to Mr. Quinlan, cashier, of the Chemical national bank?

A. Yes, sir; I did look.

Q. 81. And you could not find it?

A. I could not find it.

Q. 82. Did you look to see if you could find a copy of a letter from Mr. Harper to Mr. Quinlan, of May 21, 1887, enclosing the second lot of collateral, and asking the return of a portion of the first lot?

A. I have looked, and have just now looked again, in
81 the letter books that such copy should be made in, but no record of it appears.

Q. 83. Will you please produce the ledger account of the Chemical national bank with the Fidelity for March, 1887?

A. Yes, sir; here it is.

Q. 84. Just read the ledger entry as it appears.

A. March 2, 1887, debit $349,107.49; in the balance column, debit $332,716.35.

Q. 85. That means including the $300,000.00?

A. The charge; yes, sir.

Q. 86. Against the Chemical?

A. Yes, sir.

The WITNESS: I desire now to make a correction of my former statement in answer to a question asked me by Mr. Herron, as to when the interest had been paid on this loan. I was mistaken in saying that a draft had been sent to the Chemical national bank for $4,133.33. This amount of money had been sent to the Western National Bank of New York City, by a draft drawn on the Chemical national bank.

Judge WORTHINGTON:

Q. 87. This draft had no relation whatsoever, then, with the dealings between the Fidelity national bank and the Chemical national bank?

A. None whatever, no, sir.

Redirect examination of J. HARRY WATTERS.

By Mr. HERRON:

Q. 88. In the foreign bills tickler, about which you have spoken—testified—and in which you (said) *was* the notes of C. Aultman & Co., and of the Champion Machine Co. appear, what memorandum is made on that tickler as to the disposition of those notes, prior to the failure of the Fidelity national bank?

A. None, except that the record had been made that the paper was due and the place in which it fell due.

Q. 89. You stated, Mr. Watters, that "Exhibit No. 8," was the same as No. 9, except in one particular, now, as I understand——

A. No, sir; I said the credit side only.

Q. 90. Have you examined it to see?

A. Yes, sir.

Q. 91. Now I will ask you, does not "Exhibit No. 8" purport to be a general account current between the Fidelity national bank and the

Chemical national bank, as to all transactions between them during the time covered by the account?

82 Question objected to by counsel for complainant as misleading to the court, because the Fidelity national bank was not in existence, this report being to the receiver of the Fidelity. Exception reserved by the counsel for respondent.

A. On the face of it, it looks that way; but whether it is an actual list of all transactions that occurred, I would have to make a more thorough examination to see.

Q. 92. The question, Mr. Watters, was whether it did not purport to be a general account current between the Fidelity national bank and the Chemical national bank, as to all transactions between them during the time covered by the account?

A. Yes, sir; it does. This is not the original.

By Judge WORTHINGTON:

Q. 93. This Exhibit No. 9 covers what period of time, Mr. Watters?

A. From July 6, 1887, to November 17, 1887.

Q. 94. You just said, Mr. Watters, that this is not the original; do you mean that this is not the one sent to Mr. Armstrong, receiver, by the Chemical national bank?

A. That is the one sent to the Fidelity by the Chemical but it is not the first one.

Q. 95. Do you know when this was sent?

A. No, sir; I do not.

Q. 96. Mr. Watters, when you say it purports to show dealings between the two banks, then, you do not mean to imply that the Fidelity national bank was in existence at that date, or had existence at that date?

A. No, sir; on the face of it they were dealing with the Fidelity national bank, though.

By Mr. HERRON:

Q. 97. Mr. Watters, look at "Exhibits 8 and 9," and state whether there are not entries upon No. 8 which are not upon No. 9, on both sides of the account?

A. Yes, sir; there are.

Q. 98. In No. 9 there is a balance brought from a previous account, in the beginning of it there; is there any such item in No. 8?

A. No, sir.

Q. 99. State, at the time the paper was sent away as collateral by the Fidelity national bank, in June, to the Chemical national bank, what record was kept or made of that paper on the books of the Fidelity national bank.

Question objected to by counsel for complainant. Exception reserved by counsel for respondent.

A. None.

Q. 100. What record was kept of it?

A. None.

83 Q. 101. Was there any other cases of paper sent away by the Fidelity national bank except the three cases to the Chemical national bank?

Question objected to by counsel for complainant. Exception reserved by counsel for respondent.

A. There were.

Q. 102. What other cases?

A. The First National Bank of New York City, $113,000 of paper.

Q. 103. What record was kept of that?

A. None.

Q. 104. Was a copy kept in the letter book of the letter in which it was sent?

A. No, sir.

Q. 105. Any others?

A. None that I know of.

Q. 106. After the $300,000 was credited to E. L. Harper's account, as you have testified, state whether it was then drawn out by him?

Question objected to by counsel for complainant. Exception reserved by counsel for respondent.

A. E. L. Harper had a running account on the books of the Fidelity national bank; there was enough drawn out of his account by his checks to not only exhaust the $300,000, but several hundred thousand dollars besides.

Q. 107. State whether or not these checks were for his individual benefit?

Question objected to by counsel for complainant. Exception reserved by counsel for respondent.

A. That I cannot say. They were signed individually by him.

Q. 108. Well, were they used for the benefit of the Fidelity national bank?

Question objected to by counsel for complainant. Exception reserved by counsel for respondent.

A. No, sir; they were not.

By Judge WORTHINGTON:

Q. 109. Mr. Watters, when I was cross-examining you, I asked you if you could produce the book of the Fidelity national bank containing the entries relating to the Jung Brewing Company paper, whereupon you went after the book without answering the question. When you brought the book in, you called it the foreign bill tickler, and said that you could not find reference in it to the Jung Brewing Company paper? Have you now any explanation to make in reference to the Jung Brewing Company paper?

A. The Jung Brewing Company paper happened to be
84 paper due in the city of Cincinnati, and as domestic bills, a record of the day of such paper became due, is made on the domestic bills tickler, instead of the foreign bills tickler, which is the book I was looking in first.

Q. 110. Will you now get the domestic bills tickler, for the maturities of April and June, 1887, and see what entries there are in it relating to the Jung Brewing Company paper?

A. Yes, sir; I have both the books before me.

Q. 111. Will you find in the book for April, the note of the Jung Brewing Company coming due April 24, 1887, for $10,000.00?

A. Yes, sir; I have.

Q. 112. Does that book show whether or not it was paid to the Fidelity national bank at its maturity?

A. Yes, sir.

Q. 113. The maturity being what day?

A. April 24th, 1887; but the 24th being Sunday, it was paid on the Saturday previous, the twenty-third of April.

Q. 114. Now, Mr. Watters, as to the note due June 24th, 1887, for $25,000.00?

A. It is entered on the domestic bills tickler, and on June 24th a part payment was made of $21,808.86.

By Mr. HERRON:

Q. 115. State how, and under what circumstances the Jung Brewing Company paper came again in the possession of the Fidelity national bank?

A. I am not able to answer about the $10,000 note.

Q. 116. Well, can you answer as to the $25,000 note?

A. On May 21st, 1887, Mr. Edward L. Harper sent additional collateral to the Chemical national bank, requesting the return of certain paper that he had previously sent them; among this paper was the one piece of the Jung Brewing Company due June 24th, 1887, for $25,000.00.

Q. 117. Did the Chemical return the paper in answer to that request?

A. Yes, sir; they did.

At this point the taking of further testimony was adjourned to Saturday afternoon, three o'clock, September 26th, 1891.

SATURDAY AFTERNOON, THREE O'CLOCK, *September* 26, 1891.

Met pursuant to adjournment; but owing to the illness of Mr. Herron, counsel for respondent, a further adjournment was had to Monday afternoon, three o'clock, September 28, 1891.

85 *Deposition of David Armstrong.*

MONDAY AFTERNOON, THREE O'CLOCK, *September* 28, 1891.

Met pursuant to adjournment.

Same parties present.

DAVID ARMSTRONG, called on behalf of respondent, being first duly sworn, testifies as follows:

Direct examination by Mr. HERRON:

Q. 1. State your name, age, residence and occupation.

A. David Armstrong; age 55; residence, Jackson, Ohio; present occupation receiver of the Fidelity national bank, Cincinnati, Ohio.

Q. 2. State when you became receiver of the Fidelity National Bank of Cincinnati, and whether you have been such from that time on?

A. My commission is dated June 27, 1887, and I have been receiver ever since that date.

Q. 3. State whether, as such receiver, you have possession of all the assets of the Fidelity national bank (assets), books, and papers belonging to the Fidelity?

A. Yes, sir; I have.

Q. 4. State whether or not you have given the business of the Fidelity national bank your personal attention during that time?

A. Yes, sir; I have.

Q. 5. State what you know, if anything, of the payment to the Chemical national bank of three notes of J. W. Wilshire, endorsed by J. V. Lewis, for $25,000 each, which are held by the Chemical national bank as collateral for an alleged loan of $300,000?

A. I was advised by the Chemical national bank of the payment of the notes to them by letter, and also personally.

Q. 6. State whether you know of any other payment—of the payment of any other money to the Chemical national bank, on account of that alleged loan of $300,000, in addition to the three notes of $25,000 each?

A. Yes, I paid to them myself, as receiver, their proportion of collections made from certain bonds that were taken on the compromise with the Champion Machine Company, in settlement of the indebtedness on notes of the Champion Machine Company, which they held as collateral—which the Chemical held as collateral.

Q. 7. How much?

A. I haven't the amount here.

Q. 8. Just get it, please, if you can—the amount of the notes, and the amount of the bonds, and a memorandum of the cash that
86 you sent, and of the bonds you sent, and the dates?

Witness produces same.

A. On June 2d, 1890, I sent to the Chemical national bank $4,481.49 in cash, and five bonds for $1,000 each, one of $500, one of $200 and one of $100, upon which bonds payments had been made, so that the face value of the bonds sent at that time amounted to $5,800, making a total of cash and bonds sent on June 2d, 1890, $10,281.49. On the twenty-fourth of March——

Q. 9. Before leaving that, Mr. Armstrong, I will ask you to give the contents of the letter in which you enclosed that money. Just read it to the stenographer?

A.—

"JUNE 2D, 1890.

"Chemical national bank, New York city.

"GENTLEMEN: Your letter of the twenty-third ult. is received, and not sooner replied to owing to my absence from the city. As per my statement rendered you under date of February 12th, 1890, the amount of the four notes you held as collateral for the $300,000 loan was, together with the interest due thereon, at the time of taking the

Bonds		$19,484 75
50 per cent. paid in bonds Whitely, F. & K.	$9,742 37	
50 per cent. paid in bonds Champion Machine Co	9,472 38	
		19,484 75
Paid to me by Champion, 2 payments, ⅓ each, and interest		$4,481 49
Bonds Champion on hand		5,845 43
Bonds W., F. & K., on hand		9,742 37
		$20,469 29
Original amount of notes	$19,200 00	
Interest added as above	284 75	
Int. rec'd from Champ'n on bonds	584 54	
		$20,469 29

"Enclosed please find my check on First National Bank of Cincinnati for $4,481.49, which I charge your account against the $300,000 loan; and, also, please find herewith bonds of the Champion Machine — Nos. 289, 290, 291, 292, 293, for $1,000 each; No. 711 for $500; No. 933 for $200, and No. 1256 for $100, making total bonds $5,800, total cash and bonds $10,281.49, leaving a balance due you on account of Champion bonds of $—

"I also enclose herewith bonds of Whitely, Fassler & Kelly
87 to wit: Nos. 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034 and 1035 for $1,000 each; No. 153 for $500, and No. 138 for $100, making a total bonds of W., F. & K. $9,600, leaving a balance due you on account bonds W., F. & K. $142.37.

"I am unable to make up the above difference, to wit: $45.43 on Champion and $142.37 on W., F. & K., for the reason that I have no Champion bonds of less denomination than $100, and no W., F. & K. bonds of less denomination than $500. The above difference will have to be accounted for by me to you out of the proceeds of the bonds remaining in my hands when realized upon.

"Very truly, etc., D. ARMSTRONG, *Receiver.*"

Q. 10. Well, now then, what was sent afterwards?

A. On March 24, 1891.

Q. 11. How much did you send them at this time?

A. Twelve dollars and fifty cents in cash.

Q. 12. And what amount in bonds?

A. Two thousand three hundred dollars in bonds of the Amos Whitely Company, or the Champion Machine Company; it was the same.

Q. 13. You sent them in a letter?

A. Yes, sir; I sent them in a letter of which the following is a copy:

"MARCH 24TH, 1891.

"Chemical national bank, N. Y.

"GENTLEMEN: Your letter of March 7th is received and contents noted. You are correct about there being an error in the amount of Champion machine bonds sent you June 2d, 1890. I should have sent you bonds of the face value of $9,742.37, instead of $5,000. I now enclose you bonds of Amos Whitely & Co., to make up the difference, to wit:

No. 176 and No. 177, $1,000 each	$2,000	00
No. 688, $200, and No. 805, $100	300	00
	$2,300	00
Amount of cash sent you June 2d, 1890, in payment of ⅖ of principal	3,896	95
Amount of bonds now held by you	3,480	00
	$9,676	95
Balance due you still in my hands	65	42
	$9,742	37

88 "I included in the cash sent you in payment of two-fifths of the principal—as above stated was $5,884.54, interest for two years, making total cash sent you $4,481.49. This amount was also incorrect. The amount of interest due you and collected by me was $526.09, to wit, 3 per cent. interest on $9,742.37 one year $292.27, and 3 per cent. interest on $9,742.37 less one-fifth, $1,948.47—$7,793.90—interest $233.82, making amount overpaid you on account of interest $58.45. I collect 3 per cent. on $2,365.43, interest to November 1, 1890, for your account, $70.95. Balance due you on account of interest, $12.50, for which I enclose you my check on First national bank, Cincinnati.

"I send the bonds this day per express, charged paid, and hope you will find the above calculation correct; and am sorry that my want of consideration has caused you so much trouble and annoyance.

"Truly, etc., D. ARMSTRONG, *Receiver.*

"Please send me statement of cash received by you on the exchange of Champion bonds for bonds of Amos Whitely & Co."

Q. 14. What do you know of any other money being paid to the Chemical national bank?

A. It is not very much, and I cannot recollect the exact amount. I haven't it with me, but will get it for you.

Question passed for the present.

Q. 15. Look at the paper now shown you, Mr. Armstrong, marked "Watters Exhibit No. 9," and state what you know about it?

A. This is a paper purporting to be a statement of the Fidelity national bank in account with the Chemical national bank, furnished me by the Chemical national bank.

Q. 16. When was it furnished you, and in what way?

A. I haven't any memoranda here to tell the exact date of it, but it was on or about the last of November, 1887.

Q. 17. State whether any money was remitted to you by the Chemical national bank in connection with that account.

A. Yes, sir; they remitted $33,809.89 in connection with this account, as a balance due on this statement.

Q. 18. Have you the letter of the Chemical national bank enclosing the check and account?

A. I have no doubt I have the letter, but have been making search for it, and cannot find it.

89 Mr. HERRON: Judge Worthington, if we cannot find that I suppose we will want a copy of it?

Judge WORTHINGTON: Certainly, if we have it.

Witness promises to produce the letter referred to if he can find it.

Mr. HERRON:

Q. 19. State whether you had any conversation with the officers of the Chemical national bank in regard to the fourth note of J. W. Wilshire, endorsed by J. V. Lewis, which has not been credited on the account.

A. Yes; I have had conversation with Mr. Quinlan, the cashier of the Chemical national bank, and I have had correspondence from him in regard to it.

Q. 20. State what he said in regard to the non-payment of that note; why was it not paid?

Question objected to by counsel for complainant. Exception reserved by counsel for respondent.

A. The reason he gave for not having paid it was that they had orders from Harper not to protest any of that collateral paper, and this note was overlooked at the date of it, and they had forgotten it. But he gave the other reason, also, that Harper had given orders that none of that paper was to be protested, but to return it to Cincinnati without protest—the same thing.

Cross-examination by Judge WORTHINGTON:

Q. 21. Mr. Armstrong, have you seen, among the papers of the Fidelity national bank which came into your hands, the originals of the letters which the Chemical national bank wrote to the Fidel-

ity national bank in February, 1887, relating to this $300,000 loan—letters and telegrams?

A. I could not find anything from the Chemical national bank (that is my recollection now); I could not find anything in the records of the Fidelity national bank, and I wrote the Chemical for Harper's correspondence, and they sent me copies.

Q. 22. Mr. Armstrong, do you recollect of a loan made by the Chemical national bank to the Fidelity national bank in June, 1887?

A. I recollect of the correspondence relating to the deposit of the million dollars collateral, and arrangements made upon that deposit for the Fidelity to draw—to overdraw their account, the Chemical holding this as collateral; and probably there is in that connection about $200,000 that was placed to their credit on that collateral as a loan.

90 Q. 23. This account shown you, marked "Watters Exhibit No. 9," shows on its credit side the collections of that collateral, does it not, that was sent on in June?

A. Yes, I think so.

Q. 24. And in addition to that—or, is there any of the collateral that was sent in either February or May in this statement of collections?

A. I think there is. I think this statement here is a consolidated statement showing the credits of February and May as well as of June. I think there is no distinction made in that account.

Q. 25. You think it is all in there?

A. Yes, sir; I think it is.

Q. 26. Whatever collections they had made on collateral up to that time, without regard to when it was given to them?

A. Yes, sir.

Q. 27. And on the other hand, they have charged the Fidelity national bank with the three hundred thousand ($300,000.00) dollars loan made in March, and the two hundred thousand dollar loan made in June and with the overdrafts.

A. Yes, sir.

Q. 28. And in that way it showed—by consolidating it—it showed that there was a balance due to the Fidelity national bank thirty-three hundred thousand and some odd dollars, for which they sent you a check?

—. Yes, sir.

Q. 29. Did they have any other collateral on hand at that time, which they returned to you?

A. My recollection is that they returned all the collateral except that $25,000.00 note of Wilshire's, endorsed by Lewis, that was not protested. That is my recollection; that it was all returned except that. My best impression is that they gave me orders on Mr. Jacob Burnet, an attorney here, for all the collateral which they had sent to him; also an order on different banks to which they had sent this collateral for collection; and that I had at that time—along about the last of November—all that they had in their hands. Except I have no recollection of their having sent me—or of ever

having in my hands—the $25,000.00 Wilshire note, about which there was a dispute.

Q. 30. Did you accept the settlement which they offered to make, by sending you this money and collateral?

A. I expect I had better read to you my lettter in regard to that.

Q. 31. Just answer the question, Mr. Armstrong.

A. I acknowledged the receipt of the collateral and I don't
91 now just recall the exact phraseology of it—probably I had better refer to the letter. As to whether or not I accepted the settlement offered by them is very likely a legal question, for you lawyers to decide.

Q. 32. Did you keep the money?

A. I did.

Q. 33. Did you apply the whole of the money to the June loan and overdrafts?

A. My recollection, without referring to my books, is that I did not make any application of the money at all until after the suit which I afterwards brought—after they had sent me this amount—which I afterwards brought against the Chemical national bank to account to me for the difference between the amount that they had collected on the collateral of June and the loan of June, as distinct from the loans of February and March.

Q. 34. The result of that suit was to give credit to the Fidelity national bank of the collections that were made by the Chemical national bank, from the collateral sent to them in June, and that the Chemical paid over to the Fidelity national bank the surplus of those collections—I mean, by that, to you, of course, as receiver of the Fidelity, the surplus of those collections over the amount of the loan?

A. Yes, sir; that is correct.

Q. 35. In other words, at the time that the Chemical national bank sent this account to you, the last entry of which notes the check sent you, they were claiming to apply all collections of collateral—of February and March, as well as June—to the entire indebtedness; making a consolidated account of it, so to speak; and that (they would) be responsible to you for the difference; and that is something that you would not accede to?

A. Yes, sir; that is right.

Q. 36. Have you the letters sent to you by the Chemical national bank, under date of November 17th and 18th, 1887?

A. Yes, sir.

Q. 37. Will you produce them?

A. Yes, I do.

Letters produced—offered in evidence by counsel for complainant, and marked "Armstrong Exhibit No. 1," and "Armstrong Exhibit No. 2," respectively.

Q. 38. The business of the Fidelity national bank was usually carried on in the name of the cashier, I suppose, as other banks do business?

A. So far as my knowledge goes, which I have from inspection of

the books, the cashier seemed to attend to the general duties
92 of the office of cashier—things that are understood to be the duties of cashier.

Q. 39. Well, I was referring to the custom among banks, which is, I believe, paper is made payable to the cashier of the bank, and signed by the cashier; is that so?

A. So far as my knowledge goes, the general officers of a bank are empowered to sign all drafts, etc., but the ordinary business of the day is signed by the cashier, although the other officers of the bank are empowered to sign. The correspondents of the bank have all the signatures before them.

Q. 40. Mr. Armstrong, the proof of this claim of the Chemical national bank so made to you, in the one that is involved in this suit, is it not?

A. It was presented to me for allowance.

Q. 41. And was returned by you disallowed?

A. Yes, sir; I think I returned it to you—returned it disallowed.

Q. 42. Look at the paper now shown you, Mr. Armstrong, and see if that is the proof of claim and the disallowance that was made?

A. Yes, sir; I think that is the paper.

Paper offered in evidence by counsel for complainant, marked "Armstrong Exhibit No. 3."

Q. 43. Mr. Armstrong, have you recently made a report of the assets of the Fidelity national bank in your hands as receiver?

A. The last one I made was for the quarter ending June 30th, 1891.

Q. 44. That shows all the assets now in your hands?

A. Yes, sir; the consolidated report shows that.

Q. 45. Is that in print?

A. Yes, sir; I have a copy of it sent to me by the comptroller.

Q. 46. Have you got a copy of it?

A. Yes.

Q. 47. Have you got it here, so that you can refer to it?

A. I can get it in a minute.

Witness produces same.

Q. 48. You have now in your hands, Mr. Armstrong, the report of June last, to which you have referred?

A. Yes, sir.

Q. 49. Can you state from that report what amount of cash you then had on hand?

A. $514,905.48.

Q. 50. In addition to that, what was the estimated value of the assets which had not been converted into cash?

93 A. That is very hard to tell. I cannot tell anything from this report about that. But, from a rough calculation, I would say it would run from $300,000 to $350,000.

Q. 51. What dividends have been declared to the creditors and when?

A. Fifty per cent. has been declared and paid on all proven claims.

Q. 52. Fifty per cent. in total, you mean?

A. Yes.

Q. 53. (Question omitted from transcript.)

A. Yes, sir; The first dividends was declared October 31st, 1887, twenty-five per cent.; the second dividend was declared June 15, 1889, and was a dividend of ten per cent.; the third dividend was declared June 30, 1890, and was a dividend of ten per cent.; and the fourth was a dividend declared August 5th, 1891, and was a dividend of five per cent., making a total of fifty per cent. that has been declared and paid to all creditors who have proved their claims.

Q. 54. Mr. Armstrong, this settlement of compromise that you speak of having been made with the Champion Machine Company and Whitely, Fassler & Kelly, when was that made?

A. Do you want the exact date?

Q. 55. No, I don't care for the exact date—about——

A. It was made by order of the United States court, in case No. 4093, Jan. 4, 1888.

Q. 56. What case was that?

A. I don't remember the case now; but it was made—the order was made on the application of the party, I believe; I don't know how though.

Q. 57. Was it a settlement with you as receiver, or were you authorized, as receiver, to accept the same terms?

A. I think it was an application of David Armstrong, receiver of the Fidelity national bank, to settle on the compromise proposed.

Q. 58. What were the terms of that settlement?

A. On the paper held by the Fidelity national bank of Whitely, Fassler & Kelly, endorsed by the Champion Machine Company, we were to accept the bonds of Whitely, Fassler & Kelly for fifty cents on the dollar and the bonds of the Champion Machine Company for fifty cents on the dollar, payable in five years, I believe; in five payments, one-fifth each year, with three per cent. interest.

Q. 59. Now, about the paper of the Champion Machine Company?

A. We didn't have any of the paper of the Champion Machine Company. The Champion were the endorsers on the Whitely, Fassler & Kelly paper.

94 Q. 60. So that the only paper included in this settlement was paper of Whitely, Fassler & Kelly, endorsed by the Champion Machine Company?

A. I think that was it. I don't remember that there was any Champion Machine Company paper—but there may have been some—however, I don't remember. It was all considered in the same boat, anyway, and all settled on the same terms.

Q. 61. Prior to your sending those bonds of Whitely, Fassler & Kelly to the Chemical national bank in June, 1890, I believe it was, — had then sent to you the notes of Whitely, Fassler & Kelly which they held?

A. They surrendered them up to me, and I made the settlement

here, that is the way I got their proportion of those bonds, and collected the two payments paid by the Champion Machine Company.

Q. 62. When the Chemical national bank paid you the thirty-three thousand and odd dollars, in November, 1887, by check as appears in "Watters Exhibit No. 9," did they, at the same time, turn over to you all the collateral which they still held that had been sent to them by the Fidelity national bank in February, May and June, and which had not been collected by them?

A. My recollection is that they turned over to me all the collateral except the $25,000 Wilshire note, which was not protested.

Q. 63. How long did that collateral remain in your hands?

A. From about November, 1887, until this letter of February 11, 1890.

Q. 64. What did you do with it on February 11, 1890?

A. I returned it all back again to the Chemical national bank, at their request, except the four Champion Machine Co. notes—one for $4,500.00, due July 24, 1887; one for $5,200.00, due July 28, 1887; one for $5,000.00 due August 3, 1887, and one for $4,500.00, due August 20, 1887; which four notes amount*ing* in all to $19,200.00, which I had included in the compromise with the Champion Machine Co., by order of the United States court, prior to this date of February 11, 1890.

Q. 65. These notes of the Champion Machine Co. were endorsed, were they, by Whitely, Fassler & Kelly?

A. Yes, sir; all of them.

Q. 66. And the settlement, to which you refer, and about which you have testified in your examination-in-chief, was upon these four notes? The cash and bonds that you sent to the Chemical national bank in June, 1890, was on these four notes?

95 A. Yes; for money that I had collected on that account.

Q. 67. No, Mr. Armstrong, the terms of the settlement, as I understood you, were each party was to pay fifty per cent.—that is the maker and endorser—each was to pay fifty per cent. of the claim?

A. Yes, sir.

Q. 68. And these payments were to be made in installments of one-fifth each year, for five years, with three per cent. interest?

A. Yes, sir; that is it.

Q. 69. The $4,489.00 in cash that you received, do you recollect whether that was from the Champion Machine Company or from Whitely, Fassler & Kelly?

A. Haven't paid anything.

Q. 70. Do you recollect how many payments we represented in that?

A. Two payments; one-fifth each.

Q. 71. So that this settlement had been made by you some two years before the remittance?

A. My recollection is, now, that it was in November, 1887; that is that the bonds dated from that time. I think one of these letters of mine would state it.

Q. 72. You spoke of some other payments having been made to

the Chemical national bank, on account of some of these notes, but on account of that settlement. Do you know of your own knowledge of any such payment having been made to them?

A. I only know that by having it from Mr. Quinlan, the cashier of the Chemical national bank; the paper that they had in their possession for a compromise on the same terms, whatever that was—some paper that they had; I cannot recall just how they had it. I have got a little mixed on that, and am not clear.

At the request of counsel for the complainant, Mr. Armstrong, the witness, will examine and report in regard to the above question.

At this point *of* taking of further testimony was adjourned to Tuesday afternoon, three o'clock, September 29, 1891.

TUESDAY AFTERNOON, THREE O'CLOCK, *September* 29, 1891.

Met pursuant to adjournment; same parties present.

Continuation of the cross-examination of DAVID ARMSTRONG.

Judge WORTHINGTON:

Q. 73. Mr. Armstrong, can you state any more definitely now as to the further payments which you said you heard from Mr. 96 Quinlan, cashier of the Chemical national bank, had been made upon any securities that the Chemical national bank had?

A. I have a letter from the Chemical national bank, under date of March 28, 1891, in which they acknowledge having received——

Q. 74. Just read the letter, please?

A.—

NEW YORK, *March* 28, 1891.

D. Armstrong, Esq., receiver.

DEAR SIR: Amos Whitely & Company bonds, $2,300.00, received; also check for $12.50. The amount of cash received in exchanging Champion bonds for Whitely bonds is $184.40.

Respectfully, WM. J. QUINLAN, JR., *Cashier.*

Q. 75. In this letter I see above the "D. Armstrong, receiver," the words "replying to yours of the 24th;" that is a letter of yours of the twenty-fourth of March, is it?

A. Yes, sir.

Q. 76. Is that the letter to which you referred yesterday as having sent on those additional securities?

A. Yes, sir.

Q. 77. Will you attach a copy of that letter to your deposition?

Copy attached, marked "Armstrong Exhibit No. 3*a*."

A. Yes, sir. That letter of mine of the twenty-fourth was in answer to theirs of the seventh of March.

Q. 78. Attach a copy of Mr. Quinlan's letter on the seventh of March, and a copy of yours of the twenty-fourth, please.

Letter of Mr. Quinlan's, dated March 7, 1891, hereto attached, marked "Armstrong's Exhibit No. 4," and letter of the twenty-fourth of March, 1891, to the Chemical national bank (copy of same) hereto attached, marked "Armstrong Exhibit No. 5."

Q. 79. Your understanding, then, is that the Chemical national bank had exchanged some of those Champion Machine Company bonds, which you had sent to them in a previous letter, dated June, 1890, for bonds of Amos Whitely & Co., and had received this amount of cash at the time of the exchange?

A. Yes; that is correct.

By consent of parties, counsel for complainant, after looking at case No. 4093, may ask any further questions of this witness in regard to same.

Redirect examination of DAVID ARMSTRONG.

By Mr. HERRON:

Q. 80. Look at the exhibit now shown you, marked
97 "Watters Exhibit No. 9," and state whether that does not purport to be an account of all transactions between the Fidelity national bank and the Chemical national bank, whether they belonged to the collateral account or not?

Question objected to by counsel for complainant. Exception reserved by counsel for respondent.

A. Yes, sir; this appears from its face to bring up the balances—from beginning of this account—the balances shown on the books of the Chemical national bank, making the debit and credit entries up to the twenty-sixth of November, 1887.

Q. 81. From what time?

A. There is no date to the charges. The first date that appears, which is on the credit side, is July 6, 1887.

Q. 82. Does not this account commence with the balances of an account previously rendered—or does it not, rather, bring into it a balance?

A. It does not commence with a balance, but at the close of the account the balance——

Q. 83. No, I mean at the beginning. Look at the beginning and see if it does not commence with a balance from some previous account—on "Watters Exhibit No. 9?

A. Yes, sir; it does; there is an entry; near the top of the page is a balance from the last statement, $54,933.49.

Q. 84. Then, does it not enter errors which had been made in their previous accounts?

Question objected to by counsel for complainant. Exceptions reserved by respondent.

A. Yes, sir.

Q. 85. State under what arrangement the securities which had

been sent to the Chemical national bank, prior to the failure of the Fidelity national bank, and which had not been paid, were returned to you, as stated in your previous examination.

—. They were returned under a stipulation that was entered into between the Chemical National Bank of New York, the Montreal Bank of Chicago, and the Fidelity national bank, or rather, with myself as receiver.

Q. 86. Will you please furnish a copy of that stipulation?

A. Do you want both stipulations, or only the one between myself as receiver and the Chemical national bank?

Q. 87. Just the one between you and the Chemical national bank.

A. Yes, sir; I will furnish a copy of it.

Q. 88. State whether, in your last report to the comptroller,
98 in the item of disallowed claims, is included the amount claimed in this case by the Chemical national bank.

A. Top of the page is a balance from the last statement, $54,938.49.

Q. 89. Then does it not enter errors which had been made in their previous accounts?

Question objected to by counsel for complainant. Exception reserved by counsel for respondent.

A. Yes, sir.

Q. 90. State under what arrangement the securities which had been sent to the Chemical national bank, prior to the failure of the Fidelity national bank, and which had not been paid, were returned to you, as stated in your previous examination.

A. They were returned under a stipulation that was entered into between the Chemical National Bank of New York, the Montreal Bank of Chicago, and the Fidelity national bank, or, rather, myself as receiver.

Q. 91. Will you please furnish a copy of that stipulation?

A. Do you want both stipulations, or only the one between the Chemical national bank and myself as receiver?

Q. 92. Just the one between you and the Chemical national bank.

A. Yes, sir; I will furnish a copy of it.

Q. 93. State whether in the item in the account, your last collateral account of disallowed claims, is included the amount claimed in this case by the Chemical.

A. Yes, sir; it is.

Q. 94. And does that item state all the claims that have been presented to you and rejected, and, also, all claims appearing on the books which have not been proven in any way?

A. Yes, sir; so far as I know; it is intended to.

Q. 95. Those two items will show all the possible claims on which they may be entitled to a dividend?

A. Yes, sir.

Q. 96. Will you please attach to your deposition a copy of the letter written by you upon receipt of the collaterals, and state the date of it?

A. Yes, sir. It is dated November 29, 1887.

Judge WORTHINGTON:

Q. 97. Will you please produce, also, and attach to your deposition, the letter of the Chemical national bank, of November 25, 1887, referred to in yours of the twenty-ninth of November; you can attach a copy if you wish?

A. Yes, sir; I will.

99 Q. 98. Did you receive in response to yours a letter from the Chemical national bank, in response to yours of the twenty-ninth of November?

A. I do not think I did.

Q. 99. Was any account sent you by the Chemical national bank after you became receiver of the Fidelity national bank, prior to this one marked "Watters Exhibit No. 9"?

A. I could not answer without looking.

Q. 100. Will you please look, before the next day for taking testimony, and if you find a previous account, produce it?

A. Yes, sir; I will.

Adjourned to Tuesday afternoon, three o'clock, October 2, 1891.

TUESDAY AFTERNOON, THREE O'CLOCK, *October* 2, 1891.

Met pursuant to adjournment. Same parties present.

By Mr. HERRON:

Q. 101. Mr. Armstrong, have you found, and if so, will you now produce the account preceding the one marked "Watters Exhibit No. 9"?

A. Yes, sir; I have found it, and herewith produce it to be attached to my deposition.

Copy of same is hereto attached, marked "Armstrong Exhibit No. 3."

Q. 102. Do you also produce the stipulation between you as receiver of the Fidelity national bank, and the Chemical national bank?

A. Yes, sir; I herewith produce the stipulation.

A copy of same is attached hereto, marked "Armstrong Exhibit No. 7."

Q. 103. And the letter of the Chemical national bank, dated November 25, 1887; also, please produce and have a copy attached to your deposition.

Copy attached hereto, and marked "Armstrong Exhibit No. 8."

Q. 104. Please produce a copy of your letter of November 29, in reply to that, and attach it to your deposition.

A. I herewith produce it.

Copy of same hereto attached, marked "Armstrong Exhibit No. 9."

100 ARMSTRONG EXHIBIT No. 1.

Geo. Williams, president; Wm. J. Quinlan, Jr., cashier; J. I. Barr, ass't cashier.

Chemical national bank.

NEW YORK, *November* 17, 1887.

D. Armstrong, Esq., receiver.

DEAR SIR: Your favor of the fourteenth November has been received.

In respect to your formal demand that we remit the cash balance in our hands from proceeds of collateral notes, it is sufficient for us to say that we cannot now comply with it for the reason, if no other existed, that the levy under the attachment in the case of Bank of Montreal against the Fidelity national bank would *permit* us from so doing.

As to your claim that the proceeds of certain collateral notes deposited by the Fidelity national bank, should not be applied to discharge the indebtedness of Fidelity to the Chemical national bank generally, but only to the indebtedness growing out of the overdrafts of the Fidelity, we have to say that we do not regard the claim as well founded. As made by you it seems to rest upon the assumption that certain notes were deposited with us only to secure overdrafts which might be made by the Fidelity. This is not the fact, and if it were, we should still insist upon our right to retain and apply the proceeds to the payment of any and all indebtedness of the Fidelity to the Chemical, remaining after the indebtedness growing out of the overdraft was paid. Our position is, that we have a right to charge the Fidelity with all of its indebtedness to us arising from any cause, and that we apply the proceeds of the notes to the payment of this indebtedness, rendering the surplus of cash and the uncollected notes to you as receiver.

In regard to the note of J. W. Wilshire, endorsed by J. V. Lewis, we have to suggest that if Lewis received from the Fidelity national bank money by having the same discounted or otherwise, you, as receiver, could sue him for the amount of money which he received. We are not informed what the facts are, but on learning what they are, there will be no difficulty in making a s-tisfactory arrangement in respect to this note.

We trust all matters in difference between us will be amicably adjusted.

Very respectfully,

WILLIAM J. QUINLAN, JR., *Cashier.*

101 ARMSTRONG EXHIBIT No. 2.

Geo. G. Williams, president; Wm. J. Quinlan, Jr., cashier; J. I. Barr, ass't cashier.

Chemical national bank.

NEW YORK, *Nov.* 18, 1887.

D. Armstrong, Esq., receiver.

DEAR SIR: In addition to what I wrote you yesterday respecting that note for $50,000, of Wilshire, endorsed by Lewis, I would say that Mr. Harper, as V. P. of the "Fidelity Nat.," gave us written instructions "not to present any of the collateral paper for payment; we have advised parties we would order back and charge up here." H.'s letter is dated Cincinnati, May 19, '87.

Respectfully, WM. J. QUINLAN, JR., *C.*

ARMSTRONG EXHIBIT No. 3.

Received May 2, 1890.

Wm. Worthington:

The receiver of the Fidelity national bank hereby rejects the accompanying claim for the amount stated, he claiming that all sums realized, or which should have been realized, on the collaterals left with the Chemical national bank as security for this loan, should be credited on the same, and said claim reduced in that amount, and that all sums that may hereafter be realized on said collaterals should also be used to reduce the amount of this claim.

He is willing and now offers to accept a proof of claim from the Chemical national bank for the sum of two hundred thousand dollars, and to pay to it the dividends heretofore paid, and to be hereafter paid to other creditors thereon, without prejudice to its rights to sue upon the balance of said account not so allowed; with this stipulation, however, that should the court hold in any action that the receiver is right in his said claim, and is entitled to have all sums realized or which should have been realized on said collaterals credited on said claim, and a dividend paid only on the balance of the same, then, and in that case, all sums hereafter realized from said collaterals shall be applied to reduce the amount of said claim, herein offered to be allowed, and the same per-

102 centage on such collections accounted for, by the Chemical national bank, to the receiver as have been paid to it by him.

D. ARMSTRONG,
Receiver Fidelity National Bank.

Cincinnati, Ohio, April 25, 1890.

Complainant's Proof of Claim.

STATE OF NEW YORK, }
City and County of New York, } *ss.:*

Personally appeared before me, the undersigned, a notary public, in and for said county, Wm. J. Quinlan, Jr., cashier of the Chemical National Bank of New York City, who, being duly sworn, says that the Fidelity National Bank of Cincinnati, Ohio, was, when it became insolvent, justly indebted to said Chemical national bank in the sum of three hundred thousand dollars ($300,000), with interest at the rate of six per cent. per annum, from the second day of March, A. D. 1887, upon the following claim, to wit: Money loaned on said second day of March. At the time of making said loan, said, the Fidelity national bank, delivered to said Chemical national bank as evidence thereof its certificate of deposit, a copy of which is hereto attached as part hereof and marked "Exhibit A," and at the time of the insolvency of said Fidelity national bank and the appointment of a receiver therefor, said Chemical national bank held as collateral security for said loan sundry bills and notes receivable delivered to it by said Fidelity national bank long prior to said insolvency, a list of which is hereto attached and made part hereof, and marked "Exhibit B."

Said sum of three hundred thousand dollars, with interest as aforesaid, was wholly due and payable to said Chemical national bank alone at the time of the insolvency of said Fidelity national bank and the appointment of a receiver therefor, said Chemical national bank having given no indorsements or assignments of the same, or of any part thereof; and affiant further says that he is, and at all times aforesaid was, the cashier of the said Chemical national bank, and that he knows of no set-off or other legal or equitable defense to claim or any part thereof, existing at or before the time of the appointment of said receiver. Affiant further says that since said appointment said Chemical national bank has collected certain of the notes given it as collateral security as aforesaid, but notwithstand-
103 ing such collections, said loan has not been fully paid, and therefore said Chemical national bank by affiant makes proof of said claim as it existed at the time of said insolvency and appointment of receiver, and requests the allowance thereof and the payment of dividends from the assets in the hands of said receiver upon said full sum of three hundred thousand dollars, with interest as aforesaid, ratably with other creditors so long as any part of said loan remains unpaid.

WM. J. QUINLAN, JR.

Sworn to and subscribed before me, this third day of April, A. D. 1890. Witness my hand and notarial seal.

[SEAL.] EDWARD P. BROWN,
Notary Public.

Cert. filed N. Y. Co., Kings Co.

Certificate of Deposit.

This certificate is not subject to check, but must be presented to draw the money.

EXHIBIT A.

The Fidelity national bank.

No. 345. CINCINNATI, *Feb.* 28, 1887.

E. L. Harper has deposited in this bank three hundred thousand dollars payable to the order of himself on return of this certificate in current funds.

$300,000.00. AMMI BALDWIN, *Cashier.*

Endorsed: E. L. Harper.

EXHIBIT B.

Note of J. W. Wilshire, endorsed by J. V. Lewis, due June 28, 1887	$25,000 00
Note of J. W. Wilshire, endorsed by J. V. Lewis, due July 28, 1887	25,000 00
Note of J. W. Wilshire, endorsed by J. V. Lewis, due August 28, 1887	25,000 00
Note of J. W. Wilshire, endorsed by J. V. Lewis, due October 1, 1887	25,000 00
Note of Champion Machine Company, due July 24, 1887.	4,500 00
Note of Champion Machine Company, due July 28, 1887.	5,200 00
Note of Champion Machine Company, due August 3, 1887	5,000 00
104 Note of Champion Machine Company, due August 20, 1887	4,500 00
Note of Swift's I. and S. works, due September 16, 1887.	25,000 00
Note of Swift's I. and S. works, due September 21, 1887.	25,000 00
Note of Riverside Iron and Steel Company, due September 28, 1887	15,386 35
Note of Riverside Iron and Steel Company, due October 8, 1887	15,386 35
Note of Whitely, Fassler & Kelly, due October 4, 1887.	1,633 07
Note of Whitely, Fassler & Kelly, due October 5, 1887.	5,370 04
Note of Whitely, Fassler & Kelly, due October 13, 1887.	5,640 00
Note of Whitely, Fassler & Kelly, due October 23, 1887.	5,608 09
Note of Whitely, Fassler & Kelly, due November 4, 1887	5,343 07
Note of Whitely, Fassler & Kelly, due November 5, 1887	4,000 00
Note of Whitely, Fassler & Kelly, due November 13, 1887	5,872 00
Note of Whitely, Fassler & Kelly, due November 19, 1887	5,209 20

Note of Whitely, Fassler & Kelly, due December 4, 1887	3,892 10
Note of Whitely, Fassler & Kelly, due December 5, 1887	4,890 10
Note of Whitely, Fassler & Kelly, due December 13, 1887	5,710 52
Note of Whitely, Fassler & Kelly, due December 19, 1887	5,178 40
Note of Whitely, Fassler & Kelly, due December 23, 1887	4,413 07
Note of Whitely, Fassler & Kelly, due January 5, 1888.	4,850 00
Note of Whitely, Fassler & Kelly, due January 13, 1888.	4,200 00
Note of H. R. Bundy, payable on demand	50,000 00

This note of Bundy was secured by $100,000 Latrobe Coal & Iron Co.'s bonds.

105 ARMSTRONG EXHIBIT No 3*a*.

Chemical national bank.

NEW YORK, *March 28th*, 1891.

Replying to yours of 24th—

D. Armstrong, Esq., receiver.

DEAR SIR: Amos Whitely & Co. bonds, $2,300, received; also check for $12.50. The amount of cash received in exchanging Champion bonds for Whitely bonds is $184.40.

Respectfully, WM. J. QUINLAN, JR., *Cashier*.

ARMSTRONG EXHIBIT No. 4.

Chemical national bank.

NEW YORK, *March* 7, 1891.

D. Armstrong, Esq., receiver.

DEAR SIR: Referring to yours of June 2, 1890, I find that upon presenting the 5,800 of Champion Machine bonds for the bonds newly issued, they make returns for only $\frac{3}{5}$ of 5,800. Now, in your accounting to us for the $9,742.38 of Champion bonds, these $5,800 were treated as of that amount of value, whereas, we should have received $9,700 bonds, on which $\frac{2}{5}$ principal had been paid, and then, when we received the new bonds for reduced principal, we would have $5,800 full face value.

Am I not right in this?

Yours, etc., WM. J. QUINLAN, JR.

Received March 24, 1891.

The letter of March 24, 1891, to have been copied and attached as "Exhibit No. 5," to Mr. Armstrong's deposition is incorporated in said depostion at page 32 (*ante* p. 138).

ARMSTRONG EXHIBIT No. 6.

Under instructions from counsel for appellant and appellee,
106 said Exhibit No. 6 is not printed in full. Said exhibit is in the form of an account between the Fidelity national bank and the Chemical national bank, opening on June 1st, 1887, with balances on June 18th and June 20th, and closing on July 1st, 1887. On June 17th the Fidelity bank is credited in the account with the loan made to it by the Chemical national bank of $200,000.00, marked "Loan." On June 18th the balance against the Fidelity bank, after allowing this credit, is $113,049.99. On June 20th the balance against the Fidelity national bank is $89,030.10. And on July 1st, 1887, the balance against the Fidelity national bank is $54,938.49.

ARMSTRONG EXHIBIT No. 7.

Received December 27, 1887, from Jacob Burnet, attorney for the Chemical National Bank of New York, the above-described notes, except such as are marked as in judgment, which are on file in their respective cases in the superior court of Cincinnati, and the note of Adam Wagner for $6,750.00 now in suit in the circuit court of Campbell county, Kentucky, and in the hands of James C. Wright, Esq., attorney for the prosecution of said suit, and except also the five notes of the Swift's iron & steel works, which are filed with the master commissioner of the chancery court of Campbell county, Ky., being part of the notes transmitted by E. L. Harper, vice-president of the Fidelity National Bank of Cincinnati, to said Chemical National Bank of New York, to be held by it as collateral security and the surrender of said paper being made without prejudice to, and without waiving any of the rights of the said Chemical national bank, or of the receiver of the Fidelity national bank in the premises, and especially without waiving the rights, if any it has, of said Chemical national bank to the proceeds of such of said paper as was pledged to it prior to the fourteenth day of June last; and especially, also, without prejudice or waiver of the rights of the receiver, if any he has, to the proceeds of such paper as was sent to the said Chemical national bank on the fourteenth day of June or thereafter, or to any claim for the failure by the Chemical national bank to make demand and protest of any such paper. And said receiver agrees to indemnify said Jacob Burnet and said Chemical national bank against the costs in any proceedings commenced upon any of said collaterals.

(Signed) DAVID ARMSTORNG,
Receiver Fidelity National Bank, Cincinnati, Ohio.

J. BURNET,
Attorney for Chemical National Bank of New York.

107 In superior court of Cincinnati:

No. 42779. Chemical National Bank *vs.* Sullivan, Meade & Bush and Wm. F. Hart. Claim $2,500.
No. 42781. Same *vs.* Wm. Stichtenoth. Claim $4,028.60. In judgment.
No. 42780. Same *vs.* Baum & Balz. Claim $5,000.
No. 42782. Same *vs.* The George Weber Brewing Company. Claim $3,092.07. In judgment.
No. 42783. Same *vs.* Same. Claim $10,126.66. In judgment.
No. 42784. Same *vs.* Fred A. Hahn. Claim $3,000.
No. 42785. Same *vs.* Alice Fogarty and James Fogarty, Jr. Claim $1,000.
No. 42786. Same *vs.* Ed. Berghausen and Wm. Stichtenoth. Claim $2,558.94. In judgment.
No. 42787. Same *vs.* Samuel Lowry and Lewis Kennedy. Claim $5,051.66. In judgment.
No. 42812. Same *vs.* The George Weber Brewing Company and Wm. Stichtenoth. Claim $14,052.99. In judgment.
No. 42839. Same *vs.* Wm. Stichtenoth. Claim $3,005. In judgment.
No. 42840. Same *vs.* The Hunter Manufacturing Company and J. M. Hunter. Claim $2,000.
No. 42841. Same *vs.* The Heuck's Opera House Company. Claim $1,000.
No. 42482. Same *vs.* Clarence H. Walker. Claim $3,000.
No. 42889. Same *vs.* Wm. H. Doane. Claim $5,000.
No. 42907. Same *vs.* John Simonton & Sons. Claim $5,000.

In the Hamilton common pleas:

No. 79292. Same *vs.* Miles & Rainforth. $1,000. Settled and paid.

In Campbell county (Ky.) circuit court:

Same *vs.* Adam Wagner, $6,750 and interest from April 20, '87.

C. Aultman & Co., due September 14, 1887	$1,000 00
" due September 21, 1887, balance unpaid	4,852 97
Baum & Baum, due August 3, 1887, in suit	2,500 00
Baum & Baum, due August 10, 1887, in suit	2,500 00
T. C. Callihan & Co., due August 14, 1887, balance due about	268 67
T. & H. Clasgens, due October 16, 1887	4,000 00
The Catoclin Iron Company, due August 10, 1887	3,175 00
108 Wm. H. Chatfield, due November 8, 1887	6,750 00
W. H. Doane, due September 12, 1887, in suit	5,000 00
Alice Y. Fogarty, due May 6, 1887, in suit	1,000 00
The Heuck's Opera House Company, due September 20, 1887, in suit	1,000 00
The Hunter Manufacturing Company, due September 16, 1887, in suit	2,000 00
Kayser & Hegner, due August 12, 1887, balance due	1,350 00

Lewis Kennedy, due August 15, 1887	10,000 00
" " September 11, 1887	10,000 00
" " August 15, 1887	16,178 40
The Latrobe Coal & Iron Company, due October 4, 1887.	2,489 65
Licking Iron Company, due August 1, 1887	3,557 00
" " " due August 6, 1887	4,217 14
The Riverside Iron & Steel Company, due August 7, 1887	3,781 16
The Riverside Iron & Steel Company, due October 8, 1887	15,386 35
The Riverside Iron & Steel Company, due September 28, 1887	15,386 35
John Simonton & Sons, due August 10, 1887, in suit	5,000 00
The Swift Manufacturing Company, due October 4, 1887.	1,019 09
The Swift Manufacturing Company, due August 13, 1887.	1,306 79
The Swift Manufacturing Company, due August 16, 1887.	1,306 80
The Swift Manufacturing Company, due September 2, 1887	1,531 33
The Standard Nail & Iron Company, due September 22, 1887	2,388 18
Sullivan, Meade & Bush, due July 29, 1887, in suit	2,500 00
Swift's iron & steel works, due Sept. 17, 1887, in suit, filed with Gus. Artsman, master commissioner	25,000 00
Swift's iron & steel works, due Sept. 21, 1887, in suit, filed with Gus. Artsman, master commissioner	25,000 00
Swift's iron & steel works, due Oct. 3, 1887, in suit, filed with Gus. Artsman, master commissioner	10,000 00
Swift's iron & steel works, due Aug. 2, 1887, in suit, filed with Gus. Artsman, master commissioner	10,000 00
109 Swift's iron & steel works, due Oct. 11, 1887, in suit, filed with Gus. Artsman, master commissioner	5,000 00
The Toronto Reaper & Mower Co., due July 28, 1887	2,500 00
The Toronto Reaper & Mower Co., due Sept. 26, 1887	1,810 00
C. H. Walker, due Sept. 12, 1887, in suit	3,000 00
The Wellston D'd'ry & Mach. Co., due Sept. 20, 1887	2,483 27
Adam Wagner, due Aug. 8, 1887, in suit, Campbell Co., Ky	6,750 00
J. W. Wilshire to John V. Lewis, June 28, 1887	25,000 00
J. W. Wilshire to Lewis Kennedy, Aug. 19, 1887	8,200 00
The Hoff, Renner & Adams Mfg. Co., Aug. 28, balance due	2,500 00

ARMSTRONG'S EXHIBIT No. 8.

On letter-head of the Chemical national bank, New York, November 25, 1887.

D. Armstrong, Esq., receiver.

DEAR SIR: Herewith find notes as described, being collaterals held for advances to Fidelity national bank:

	Champion Machine Company, due July 24, 1887, protested	$4,500 00
	Champion Machine Company, due July 28, 1887, protested	5,200 00
	Champion Machine Company, due July 31, 1887, protested	3,240 00
	Champion Machine Company, due August 3, 1887, protested	5,000 00
	Champion Machine Company, due August 5, 1887, protested	3,750 00
	Champion Machine Company, due August 6, 1887, protested	4,321 00
	Champion Machine Company, due August 20, 1887, protested	4,500 00
	Champion Machine Company, due August 28, 1887, protested	4,780 20
	Champion Machine Company, due August 31, 1887, protested	5,610 20
	Champion Machine Company, due September 4, 1887, protested	4,273 18
	Champion Machine Company, due September 5, 1887, protested	4,650 00
110	Champion Machine Company, due September 6, 1887, protested	5,480 10
	Champion Machine Company, due September 9, 1887, protested	5,420 10
	Champion Machine Company, due September 18, 1887, protested	5,200 00
	Champion Machine Company, due September 28, 1887, protested	6,720 00
	Champion Machine Company, due September 30, 1887, protested	5,000 00
	Champion Machine Company, due October 4, 1887, protested	3,841 08
	Champion Machine Company, due October 6, 1887, protested	4,500 00
	Champion Machine Company, due October 9, 1887, protested	5,817 00
	Champion Machine Company, due October 14, 1887, protested	4,500 00
	Champion Machine Company, due October 29, 1887, protested	4,500 00
	Champion Machine Company, due October 30, 1887, protested	4,000 00
	Champion Machine Company, due October 31, 1887, protested	3,000 00
	Champion Machine Company, due October 31, 1887, protested	5,000 00
	Champion Machine Company, due November 5, 1887, protested	3,800 00

Champion Machine Company, due November 7, 1887, protested	4,000 00
Whitely, Fassler & Kelly, Dec. 4, not due	3,829 10
Whitely, Fassler & Kelly, Dec. 5, not due	4,890 10
Whitely, Fassler & Kelly, Dec. 13, '87, not due	5,710 52
Whitely, Fassler & Kelly, Dec. 19, '87, not due	5,178 40
Whitely, Fassler & Kelly, Dec. 23, '87, not due	4,413 17
Whitely, Fassler & Kelly, Jan. 5, '88, not due	4,850 00
Whitely, Fassler & Kelly, Jan. 13, '88, not due	4,210 00
P. G. Thompson, Dec. 11, '87, not due	833 33
P. G. Thompson, Dec. 18, '87, not due	833 33
P. G. Thompson, Jan. 26, '88, not due	750 00
P. G. Thompson, Feb. 11, '88, not due	833 33
P. G. Thompson, Feb. 18, '88, not due	833 33
P. G. Thompson, Apr. 11, '88, not due	833 33
P. G. Thompson, Apr. 18, '88, not due	833 34
H. S. Bundy, dated March 14, 1887, demand	50,000

$100,000 bonds Latrobe Coal & Iron Co., Nos. 184 to 233, both inclusive, and Nos. 334 to 383, both inclusive, collateral to same, first coupon due January 1, 1888.

111 The July, 1887, coupons were not attached to bonds when received.

Whitely, Fassler & Kelly, due July 7, protest	$3,800 00
Whitely, Fassler & Kelly, due July 7, protest	2,650 00
Whitely, Fassler & Kelly, due July 13, protest	4,218 73
Whitely, Fassler & Kelly, due July 15, protest	3,840 20
Whitely, Fassler & Kelly, due July 16, protest	3,218 00
Whitely, Fassler & Kelly, due July 18, protest	4,874 00
Whitely, Fassler & Kelly, due July 21, protest	4,630 10
Whitely, Fassler & Kelly, due July 26, protest	4,883 40
Whitely, Fassler & Kelly, due July 28, protest	2,500 00
Whitely, Fassler & Kelly, due July 28, protest	2,620 40
Whitely, Fassler & Kelly, due Aug. 1, protest	2,210 40
Whitely, Fassler & Kelly, due Aug. 2, protest	2,340 10
Whitely, Fassler & Kelly, due Aug. 7, protest	5,300 00
Whitely, Fassler & Kelly, due Aug. 21, protest	4,270 93
Whitely, Fassler & Kelly, due Aug. 30, protest	4,710 09
Whitely, Fassler & Kelly, due Aug. 31, protest	5,480 10
Whitely, Fassler & Kelly, due Sep. 2, protest	3,911 07
Whitely, Fassler & Kelly, due Sep. 6, protest	5,880 09
Whitely, Fassler & Kelly, due Sep. 7, protest	4,820 03
Whitely, Fassler & Kelly, due Sep. 21, protest	4,740 00
Whitely, Fassler & Kelly, due Sep. 24, protest	5,420 71
Whitely, Fassler & Kelly, due Sep. 28, protest	3,107 90
Whitely, Fassler & Kelly, due Oct. 2, protest	4,520 00
Whitely, Fassler & Kelly, due Oct. 1, protest	5,891 04
Whitely, Fassler & Kelly, due Oct. 4, protest	4,633 07
Whitely, Fassler & Kelly, due Oct. 5, protest	5,370 04
Whitely, Fassler & Kelly, due Oct. 6, protest	5,317 00
Whitely, Fassler & Kelly, due Oct. 13, protest	5,640 00

Whitely, Fassler & Kelly, due Oct. 23, protest..... 5,608 09
Whitely, Fassler & Kelly, due Oct. 24, protest..... 5,330 44
Whitely, Fassler & Kelly, due Nov. 4, protest..... 5,343 07
Whitely, Fassler & Kelly, due Nov. 5, protest..... 4,000 00
Whitely, Fassler & Kelly, due Nov. 13, protest..... 5,872 00
Whitely, Fassler & Kelly, due Nov. 19, protest..... 5,209 20

Please to acknowledge receipt.

Very respectfully,

(Signed) WM. J. QUINLAN, JR., *Cashier.*

ARMSTRONG EXHIBIT No. 9.

CINCINNATI, OHIO, *November* 29, 1887.

Wm. J. Quinlan, Jr., cashier Chemical national bank, New York.

112 DEAR SIR: Your letter of the twenty-fifth inst. received, together with uncollected collateral notes and orders on Second National Bank of Springfield, Ohio, Third national bank, Cincinnati, and Hon. Jacob Burnet for notes in their hands. Owing to the fact of my men being witnesses in the Harper trial, which begins today, I will not be able to check up this paper at present; but will do so at as early a date as possible, and advise you. You will, of course, understand that I received from you these notes and securities, without prejudice to the claim made by me, as contained and fully set forth in my letter to you under date of November 14th, inst.

Very respectfully,

(Signed) DAVID ARMSTRONG, *Receiver.*

WATTERS EXHIBIT No. 2.

The Fidelity national bank.

When city checks are deposited, name the bank on which they are drawn. When foreign checks or drafts, name the State on which they are drawn.

CINCINNATI, *March* 2, 1887.

Credit account E. L. Harper:

Currency..... ....
Coin..... ....
Checks..... ..... $300,000

WATTERS EXHIBIT No. 3.

CINCINNATI, 1887.

The Fidelity national bank.

(Copy.)

Credit check..... .....
Transfer of funds..... .....
E. L. H..... .... $300,000
Charge Chemical, N. Y..... .....

113 WATTERS EXHIBIT No. 4.

Copy of letter dated—

CINCINNATI, OHIO, *Feb'y 28th*, '87.

To Wm. J. Quinlan, Jr., Esq., cashier Chemical national bank, New York city, N. Y.

DEAR SIR: Enclosed herewith, we hand you for credit our certificate of deposit, No. 345, for $300,000.00, with bills as collateral as follows:

Jung Brewing Co., due June 24, 1887	$25,000 00
Jung Brewing Co., due April 24, 1887	10,000 00
Swift's iron & steel w'ks, due May 18, '87	25,000 00
Swift's iron & steel w'ks, due May 28, '87	25,000 00
J. W. Wilshire, endorsed by—	
J. V. Lewis, due May 28, '87	25,000 00
J. V. Lewis, due June 28, '87	25,000 00
J. V. Lewis, due July 28, '87	25,000 00
J. V. Lewis, due Aug. 28, '87	25,000 00
Riverside iron & steel w'ks, due May 22, '87	15,000 00
Riverside iron & steel w'ks, due May 31, '87	15,000 00
C. Aultman & Co., due May 16, '87	10,000 00
C. Aultman & Co., due May 20, '87	10,000 00
C. Aultman & Co., due May 23, '87	10,000 00
C. Aultman & Co., due May 27, '87	10,000 00
C. Aultman & Co., due May 31, '87	10,000 00
Champion Machine Co., due June 1, '87	5,500 00
Champion Machine Co., due June 1, '87	5,378 01
Champion Machine Co., due June 10, '87	4,350 10
Champion Machine Co., due June 10, '87	4,610 00
Champion Machine Co., due June 11, '87	5,487 00
Champion Machine Co., due June 15, '87	5,700 00
Champion Machine Co., due June 22, '87	5,620 19
Champion Machine Co., due June 24, '87	5,850 00
Champion Machine Co., due July 24, '87	4,500 00
Champion Machine Co., due July 24, '87	5,200 00
Champion Machine Co., due Aug. 3, '87	5,000 00
Champion Machine Co., due Aug. 20, '87	4,500 00

We desire to keep a large reserve with you, and we trust you will make the rate as low as you proposed some time since. Please place the amount to our credit and advise the rate.

Respectfully yours,

(Signed) E. L. HARPER, *V. P.*

114 WATTERS EXHIBIT No. 5.

Copy of letter dated—

CINCINNATI, OHIO, *May* 21, 1887.

To Chemical national bank, New York city.

GENTLEMEN: Enclosed herewith we hand you to hold as collateral the following bills:

H. S. Bundy, demand	$50,000 00
Swift's iron & steel w'ks, May 13, 4 mos.	25,000 00
Swift's iron & steel w'ks, May 18, 4 mos.	25,000 00
J. W. Wilshire, April 28, 5 mos.	25,000 00
Riverside iron & steel w'ks, due Sept. 28th	15,386 35
Riverside iron & steel w'ks, due Oct. 8th	15,386 35
Whitely, Fassler & Kelly, April 1st, 6 mos.	4,633 07
Whitely, Fassler & Kelly, April 1st, 7 mos.	5,343 07
Whitely, Fassler & Kelly, April 1st, 8 mos.	3,892 10
Whitely, Fassler & Kelly, April 20, 6 mos.	5,608 09
Whitely, Fassler & Kelly, April 20, 8 mos.	4,413 17
Whitely, Fassler & Kelly, May 2nd, 5 mos.	5,370 04
Whitely, Fassler & Kelly, May 2nd, 6 mos.	4,000 00
Whitely, Fassler & Kelly, May 2nd, 7 mos.	4,890 10
Whitely, Fassler & Kelly, May 2nd, 8 mos.	4,850 00
Whitely, Fassler & Kelly, May 10, 5 mos.	5,640 00
Whitely, Fassler & Kelly, May 10, 6 mos.	5,872 00
Whitely, Fassler & Kelly, May 10, 7 mos.	5,710 52
Whitely, Fassler & Kelly, May 10, 8 mos.	4,210 00
Whitely, Fassler & Kelly, May 16, 6 mos.	5,209 20
Whitely, Fassler & Kelly, May 16, 7 mos.	5,178 40

Will you kindly return me the following: C. Aultman & Co., due May, five pieces; Swift iron & steel works, due in May, two pieces; Champion Machine Co., due in June, eight pieces; June Brewing Co., due in June, one piece; J. W. Wilshire, due in May, one piece; Riverside Iron & Steel Co., due in May, two pieces. We will pay the loan July 15th, 1887, if agreeable to you, and will pay interest now to that date.

Respectfully yours,

(Signed) E. L. HARPER, *V. P.*

115 WATTERS EXHIBIT No. 6.

Chemical national bank.

NEW YORK, *July* 23, 1887.

D. Armstrong, Esq., receiver.

DEAR SIR: Your favor of the — has been received.

Mr. J. V. Lewis has paid note of J. W. Wilshire, endorsed by him, $25,000, due July 28.

Resp'y, WM. J. QUINLAN, JR.

WATTERS EXHIBIT No. 7.

Chemical national bank.

NEW YORK, *August* 24, 1887.

Receiver of the Fidelity bank, Cincinnati, Ohio:

We have received payment for collateral note as follows: J. V. Lewis, $25,000, due August 28, 1887.

Very respectfully, WM. J. QUINLAN, JR., *Cashier.*

WATTERS EXHIBIT No. 8.

Under instructions from counsel for appellant and appellee, said Exhibit No. 8 is not printed in full. It is in the form of an account between the Fidelity national bank and the Chemical national bank, running from July 6th, 1887, to November 26th, 1887, and shows on the right-hand side the collections made by the Chemical national bank upon the collateral securities sent to it by the Fidelity national bank in March, May and June, 1887; and upon the left-hand side charges for fees, etc., relating to such collections.

WATTERS EXHIBIT No. 9.

Under instructions from counsel for appellant and appellee, said Exhibit No. 9 is not printed in full. It is a more detailed account of the same nature as that shown in Watters Exhibit No. 8;
116 and shows in addition on the left-hand side the charging off on August 25th, 1887, of $300,000.00 being the loan of March 2nd, 1887, and on October 1st, 1887, of $200,000.00, being the loan of June 17th, 1887, and the remittance on November 26th, 1887, by the Chemical national bank to the Fidelity national bank of $33,809.89, the balance to the credit of the Fidelity national bank, as shown by said account of collections.

Under instructions from counsel for appellant and appellee, said Watters Exhibit No. 10 is not printed. The same exhibit has been printed already in a separate publication, and said publication shall be treated as part of this printed record and bound therewith.

THE STATE OF OHIO, }
Hamilton County, } ss:

I, Wm. C. Herron, a notary public in and for the county and State above named, duly commissioned and qualified, do hereby certify that the above-named J. Harry Watters and David Armstrong, were by me first severally sworn to testify the truth, the whole truth, and nothing but the truth, and that the foregoing depositions were reduced to writing, subscribed as above set forth, by E. V. Ryan, in my presence, who is not in any way interested in said cause, and were subscribed by the said witness- respectively, in my presence, and continued from day to day, as above set forth, that said depositions were taken at the time and place specified in

the notice hereto attached, and that I am not counsel, attorney or relative of either party, or otherwise interested in the event of this suit.

In testimony whereof, I have hereunto set my hand and official seal, this sixth day of October, A. D. 18—.

WM. C. HERRON,
[SEAL.] *Notary Public, Hamilton County, O.*

Total cost of taking depositions, $45.00.

Received of David Armstrong the sum of $45.00 in full of my fees, as above specified, and also in full of constable's fees. The witnesses were paid their fees.

WM. C. HERRON,
Notary Public.

Stipulation.

117 And afterwards, to wit, on the 20th day of November, A. D. 1891, the following stipulation was filed in the clerk's office of said court clothed in the words and figures following, to wit:

CINCINNATI, *Oct.* 28, 1891.

Wm. Worthington, Esq.

DEAR SIR: I find that Stewart, trustee for E. L. Harper & Co., claims to have paid the Chemical national bank on March —, 1891, $2,917.12, a four per cent. dividend on fifteen notes of Whitely, Fassler & Kelly, endorsed by E. L. Harper & Co., of $74,819.16, all of which I believe were held as collateral to $300,000.

Please advise me as soon as you can hear from your client if you will stipulate that this payment may be added to our testimony.

Yours, JOHN W. HERRON.

It is agreed that the above payment was made as stated, being upon collateral described in the bill of complaint as Whitely, Fassler & Kelly notes.

WM. WORTHINGTON,
Counsel for Complainant.

Memoranda of Decree.

And afterwards, to wit, on the second day of July, A. D. 1892, the following memoranda with reference to form of decree, was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Memoranda of Judge Sage.

FORT RUSSELL, WYOMING, *June* 28, 1892.

I have endorsed for entry the decree as prepared by Judge Worthington, for the reasons:

1. I did not find that the loan was made by E. L. Harper for his individual use. Personally I have no doubt that such was the fact from what I know of the man, and of the circumstances of his rela-

tion to the bank and to the wheat deal, but I did not feel authorized to draw that inference from the fact in evidence, that he appropriated the proceeds of the loan, almost immediately to his own use. It was negotiated by him as vice-president of the Fidelity bank. In law the loan was a loan to the Fidelity bank. The
118 Chemical bank dealt only with the Fidelity bank. They are the principals. The Chemical bank has all the rights of a principal, and the Fidelity incurred all the liabilities of a principal, whatever its rights against Harper.

2. It is not necessary to include in the decree a statement of the offer made by the defendant to allow and pay, conscientiously and without prejudice, dividends on the sum of $200,000, nor a statement of the payments made to the Chemical bank after its proof of claim. The reasons for the conclusions reached by the court are set forth in the opinion, a copy of which will be included in the transcript and certified upon appeal. It will, of course, be the duty of the appellate court to look to the record to determine whether the finding and conclusions of the court below were warranted by the facts and law of the case. It will not be limited by the language of the decree.

GEORGE R. SAGE.

Assignment of Error by Defendant.

And afterwards, to wit, on the eighth day of July, A. D. 1892, the following assignment of error was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

United States Circuit Court, Southern District of Ohio, Western Division.

THE CHEMICAL NATIONAL BANK OF NEW YORK CITY, New York,
vs.
DAVID ARMSTRONG, Receiver of the Fidelity National Bank of Cincinnati, Ohio.
} Assignment in Error.

Now comes the said defendant and presents this, his assignment of errors, to the final decree of the court herein, to wit:

That the court erred in finding that there was due to the said complainant from the Fidelity National Bank of Cincinnati, as of the twenty-first of June, 1887, the sum of $205,450.00.

That the court erred in refusing to credit on the amount found due the complainant the sums collected by it after the twenty-fifth of April, 1890, from collaterals held by it as security for the
119 loan claimed to have been made by it to the Fidelity national bank.

That the court erred in refusing to compel the complainant to exhaust the collaterals held by it as security for said alleged loan before ordering dividends upon the same to be paid to it, and in

ordering dividends to be paid to complainant upon said claims without reference to the collaterals still held by it.

JOHN W. HERRON,
Solicitor for Defendant.

Appeal Bond of Defendant.

And afterwards, to wit, on the twenty-seventh day of July, A. D. 1892, the following appeal bond was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Appeal bond.

Know all men by these presents that we, David Armstrong, receiver of the Fidelity National Bank of Cincinnati, as principal, and David Armstrong and W. S. Rowe, as sureties, are held and firmly bound unto the Chemical National Bank of the City of New York in the full and just sum of one thousand dollars, to be paid to the said The Chemical National Bank of New York, and its certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, our executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-seventh day of July, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas lately, at a term of the circuit court of the United States for the southern district of Ohio, in a suit depending in said court between The Chemical National Bank of New York, plaintiff, and David Armstrong, receiver of the Fidelity National Bank of Cincinnati, defendant, a decree was rendered against the said David Armstrong, receiver of the Fidelity national bank, and the said David Armstrong, receiver as aforesaid, having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said Chemical National Bank of New York, citing and admonishing it to be and appear at a session of the United States circuit
120 court of appeals for the sixth circuit, to be holden at the city of Cincinnati, in said circuit, on the eighth day of August next:

Now, the condition of the above obligation is such that if the said David Armstrong, receiver as aforesaid, shall prosecute said appeal to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

D. ARMSTRONG,
[SEAL.] *Receiver of the Fidelity Nat. Bank, Cin'ti.*
D. ARMSTRONG.
W. S. ROWE.

Sealed and delivered in presence of:

——— ———.

Approved by—
JOHN W. HERRON.

And afterwards, to wit, on the 22nd day of April, A. D. 1895, the following mandate was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Mandate.

Missing.

And afterwards, to wit, on the 7th day of September, A. D. 1895, an order was made upon the order book of said court, clothed in the words and figures following, to wit:

Order Book A, page 61.

Special Examiner Appointed.

By consent of parties E. V. Ryan is appointed examiner in this cause. Thereupon came said E. V. Ryan and accepted said appointment and was duly sworn to perform the duties of said examiner.

And afterwards, to wit, on the 17th day of September, A. D. 1895, the following oath of special examiner was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

121 *Oath of Special Examiner.*

United States Circuit Court, S. D. O.

CHEMICAL NATIONAL BANK } No. 4339.
vs.
DAVID ARMSTRONG, ETC.

I, Effie V. Ryan, having heretofore been appointed special examiner in the above-entitled cause, do solemnly swear that I will faithfully and impartially perform my duties as such master, agreeable to the order of the court, to the best of my ability and understanding. So help me God.

EFFIE V. RYAN.

Sworn to before me, and signed in my presence, this 17th day of September, A. D. 1895.

[SEAL.] B. R. COWEN, *Clerk.*

And afterwards, to wit, on the 4th day of November, A. D. 1895, the following depositions were filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Deposition of Wm. J. Quinlan, Jr., et al.

U. S. Circuit Court, Southern District of Ohio, Western Division.

CHEMICAL NATIONAL BANK, Plaintiff,
vs.
DAVID ARMSTRONG, as Receiver of the Fidelity National Bank, Defendant.

Testimony on behalf of plaintiff taken under the annexed notice before Julius W. Rothchild, a notary public in and for the city and county of New York, on Thursday, October 24, 1895, at 11 a. m., in the city of New York.

Appearances: William Worthington, Esq., and George C. Kobbe, Esq., for plaintiff; John W. Herron, Esq., for defendant.

WILLIAM J. QUINLAN, of lawful age, being by me first duly cautioned and sworn as a witness on behalf of the plaintiff, deposes and says as follows:

By Mr. WORTHINGTON:

122 Q. 1. You are the cashier of the Chemical National Bank of New York City, are you not?

A. I am.

Q. 2. How long have you held that position?

A. Since 1878.

Q. 3. Have you made search among the files of the Chemical national bank to see whether you can find any of the correspondence with the Fidelity National Bank of Cincinnati, referring to the reconcilement of the account current rendered by the Chemical bank to the Fidelity bank in April, 1887, for the transactions between those two banks for the month of March, 1887?

A. I have.

Q. 4. Can you find anything?

A. I cannot.

Q. 5. What is the practice of the Chemical bank of keeping such?

A. Notations would be made on the slips received from the Fidelity bank; those notations would be made by our book-keeper and to write to the Fidelity.

Q. 6. Was it the practice to keep any record of the notations?

A. No, sir.

Q. 7. Look at the paper which I now hand you, being the one heretofore offered in evidence in this case and marked "Letter as to reconcilement of April account, E. B. R., special examiner," being a letter written upon the letter-head of the Fidelity National Bank of Cincinnati, 5–12–'87, meaning May 12, 1887, and having at the end of it a letter dated New York, May 19th, 1887, signed W. J. Quinlan, Jr., per F., and I will ask you if that is one of the letters

from the Fidelity bank with notations made by your bank to which you have referred?

A. It is.

Q. 8. Do you recognize the handwriting of the letter of May 19, 1887?

A. I do; it is that of Mr. Firth.

Q. 9. He was then what?

A. He was then, I think, general book-keeper at that time and had charge of that department, the reconcilement of account. He is not with us now.

Q. 10. I hand you a document already offered in evidence in this case and marked "Reconcilement sheet for April, E. B. R., special examiner," being a sheet that was made out by the Fidelity national bank of the differences between the account current as kept by the Chemical national bank for the month of April, 1887, and the same account as kept upon the books of the Fidelity Bank of Cincinnati, and ask you whether the reconcilement sheet
123 ever came or was sent by the Fidelity bank to the Chemical bank, or whether it was the practice to send such sheets showing differences of account between one bank and the other?

A. I doubt very much if this sheet was ever in our hands; but my impression is it was the custom of the Fidelity bank to make notations on the account and not to return the sheet itself.

Q. 11. When you say notations of that account, do you mean of that account shown on the letter of May 12?

A. Yes, sir.

Q. 12. I hand you another paper which has heretofore been offered in evidence in this case marked "Letter from Quinlan to Baldwin, May 18th, 1887, E. B. R., special examiner," and purporting to be a letter dated May 18th, 1887, written on the letter-head of the Chemical national bank and addressed to Ammi Baldwin, cashier, and ask you if you know the handwriting?

A. Yes, sir; that was written by Mr. Firth.

Q. 13. Was he at the time a clerk in the Chemical bank?

A. Yes; he was the general book-keeper and had charge of that reconcilement department.

Q. 14. I also hand you another letter heretofore offered in evidence and marked "Letter from Quinlan to Ammi Baldwin, May 11, 1887, E. B. R., special examiner," and being upon the letter-head of the Chemical national bank and dated May 11, 1887, addressed to Ammi Baldwin. Do you recognize that?

A. Yes; that was also written by Mr. Firth.

Q. 15. I also show you another letter heretofore offered in evidence in this case and marked "Letter from Quinlan to Armstrong, E. B. R., special examiner, July 6th, 1887," being a letter upon the letter-head of the Chemical national bank, dated July 6th, 1887, and addressed to Edward Armstrong, Esq., receiver, and purporting to be signed by you.

A. That was written by me.

Q. 16. Do you know whether or not prior to the decision of the Supreme Court of the United States in the case of The Western Na-

tional Bank against Armstrong, a decision rendered in the spring of 1894, believe it was, it was or was not a usual thing for a national bank to borrow money?

Objected to as incompetent and irrelevant.

A. Very usual.

Q. 17. What officer acted for the borrowing bank in such transactions?

A. Either the president, vice-president, cashier, or assistant cashier.

124 Q. 18. Prior to that decision, was it customary for the lending bank to demand proof of the authority of the officer of the borrowing bank making the request in the manner of a resolution of the board of directors from the borrowing bank authorizing the loan?

A. No, sir. I can't say I ever heard of such a request.

Q. 19. Prior to the decision of the Supreme Court of the United States to which I have referred, had the Chemical bank made loans to banks other than the loan involved in this case to the Fidelity national bank?

A. Never to the Fidelity national bank, but it has been our practice to make such loans for many years.

Q. 20. And upon what authority would the loans be made?

A. Upon the request of the official of the borrowing bank.

Q. 21. In large amounts or in small?

A. All kinds of amounts—large and small.

Cross-examination by Mr. HERRON:

Q. 1. I believe you were instrumental in making this loan to the Fidelity national bank, were you not?

A. Yes, sir.

Q. 2. And you did not require any authority from the directors of the Fidelity national bank?

A. No, sir.

Q. 3. And it is your idea that the president, cashier or assistant cashier of a national bank can borrow whatever sum of money he pleases without any authority from the board of directors?

A. That is the usual custom of business.

Q. 4. That was the usual custom with your bank, and you believe that to be the usual custom of banks, do you?

A. That was, without qualification.

Q. 5. That the assistant cashier or cashier could borrow whatever amount of money he pleased?

A. The books of this bank would show that and that the borrowing bank received so much to its credit.

Q. 6. It was your custom or the custom of your bank, before the decision of the Supreme Court, to lend on the request of a cashier or assistant cashier of a national bank, whatever sum he saw fit to ask of you?

A. Yes.

Q. 7. Without asking for any authority from his board of directors?

A. Yes, that is the fact.

Q. 8. On what did you usually make these loans?

A. On bills receivable, frequently a receiving a certificate
125 of deposit and the receivables securing that certificate or loan; the certificate of deposit taking the place of a note, because the Comptroller of the Currency had for some years held that a national bank could not give a note except its circulating notes.

Q. 9. Then you know the Comptroller of the Currency had decided that a national bank could not give a note, did you?

A. That would seem to be the impression in our minds and in the minds of others that a national bank had no authority to give a note other than their circulating notes. When a bank wished to borrow—shall I use the expression—it "got around" that fact by sending on a certificate of deposit with the bills receivable.

Q. 10. Then it was the understanding of your bank and of others that a national bank could not give a note for borrowed money?

A. No, sir; I can't say it was the understanding, but it was our impression that some Comptroller of the Currency had held that that was the case, that national banks could not give a note.

Q. 11. And it was your impression at that time that a national bank could not give a note for money?

A. No. We thought he was wrong, as has been proven since, because the subsequent Comptroller of the Currency had given them that authority.

Q. 12. But it was your impression at that time that the Comptroller of the Currency had decided that a national bank could not give a note for borrowed money?

A. I can't say whether it was that particular time, but I know there was a time, but it is not distinct in my mind as to the particular date that there was some question in our minds whether the Comptroller of the Currency would justify the giving of a note by a national bank other than a circulating note.

Q. 13. And it was to get around that decision that you adopted the plan of a certificate of deposit?

A. Excuse me. We didn't adopt the plan. The borrowing banks adopted the plan.

Q. 14. Your bank adopted the plan of requiring something of that kind?

A. No; we didn't even do that. We would sometimes make a loan to a bank without that certificate of deposit—merely upon the request in a letter that they had sent certain collaterals to secure a certain advance of loan. If they preferred to send a certificate of deposit it was all right. We knew they got the money.

Q. 15. You knew, too, that the certificate of deposit did not represent what it purported to represent?

126 A. We didn't know much about it. We didn't ask the question.

Q. 16. You knew that the certificate of deposit was intended to represent a debt of the bank to the loaning bank?

A. We supposed this. We knew nothing whatever, but we supposed this, that in order to avoid rediscounts the borrowing bank issued this certificate of deposit, which fulfilled two purposes; it increased their deposit line, which would be showing strength, and it did not appear as a rediscount nor a loan.

Q. 17. You knew that that certificate of deposit in such a case did not represent money deposited in a bank, as it purported to be?

A. No, excuse me; we didn't know any such thing.

Q. 18. You did not know that?

A. No; we didn't know that.

Q. 19. In whose name were those certificates of deposit usually issued?

A. Various names; sometimes in the name of an officer of a bank, as an individual, sometimes in his name as an officer of the bank, sometimes they would make them payable to the Chemical national bank, sometimes they would make them payable to W. J. Quinlan, Jr., cashier—I cannot remember, because it is so long a time ago and sometimes they would say we had deposited that money in the bank.

Q. 20. In the case where it was made payable—where the certificate of deposit was made payable to one of the officers of the bank did you suppose that officer had deposited the money in the bank?

Objected to as immaterial.

A. We knew nothing about it. We couldn't tell. We didn't ask the question, hence we could not tell.

Q. 21. You were not in the habit of asking any questions about it?

A. No, sir; because we didn't depend upon that certificate at all.

Q. 22. In the case that is now under consideration, did you suppose that Edward L. Harper had deposited in the Fidelity national bank $300,000?

A. I don't know what I did suppose at the time; it is 8½ years ago.

Q. 23. You did not know whether that bank owed him $300,000 or not?

A. No; I didn't know that.

Q. 24. And you asked no questions about?

A. Asked no questions about it. We supposed the Fidelity national bank wanted to borrow $300,000, and they sent on that
127 certificate with the collaterals attached, rather than send a note; that is what we supposed. If we had not supposed the Fidelity national bank wanted that money, the money would not have been loaned.

Q. 25. You regarded the certificate of deposit of the Fidelity national bank to the order of E. L. Harper as an obligation to the Chemical national bank for that amount of money, did you?

Objected to as incompetent and immaterial.

A. If the Fidelity national bank had not sent any certificate of deposit at all, the loan would have been made upon the collaterals.

The certificates of deposit, as I remarked before, were usually sent for the purpose of avoiding the matter of using a note. The transaction would have been a complete transaction, so far as we were concerned, and the loan would have been made without that certificate of deposit. We didn't rely upon the certificate of deposit. We relied upon the fact that we credited $300,000 the Fidelity national bank.

Q. 26. Can you answer my question?

A. I have tried to do it.

Q. 27. My question was whether you regarded the certificate of deposit as an obligation of the Fidelity national bank to the Chemical national bank when you advanced the money?

A. We considered them in our debt $300,000. Had they sent the certificate of deposit without the collaterals they would not have probably got the loan. Had they sent the collaterals without the certificate of deposit they would have got the loan probably.

Q. 28. Did you regard the certificate of deposit as an obligation of the Fidelity national bank to the Chemical bank?

A. Yes; I regarded it in that sense.

Q. 29. In such loans as you have testified to, did you not in all cases require collaterals for the loans made, either bills receivable or bonds, or something of that character?

A. I think we did. I can't recall any case where we have not required or where we have not received them.

Q. 30. Were not loans made on the faith of collaterals which were sent?

Objected to as before.

A. There were two reasons why we would make the loan. The collaterals to the credit of the borrowing bank. We had recourse to two horns. If the collaterals failed us, we had the borrowing bank; if the borrowing bank failed us we had the collaterals.

Q. 31. But in no case did you make a loan without having, as you regarded it, sufficient collateral to secure the loan?

128 A. That is the common method, to have sufficient security. If the borrowing bank was sufficiently—strong—I don't know; we might make a loan, but it was not the custom, because we never asked it.

Q. 32. And you have no recollection of ever having done so?

A. No; I can't recollect any case.

Q. 33. In regard to this matter of these letters as to the reconcilement of the accounts, have you any personal knowledge of the matter at all?

A. Nothing, except I notice that it is our general book-keeper's memorandum. They have not come before me.

Q. 34. They did not come before you at that time?

A. No, sir.

Q. 35. You had nothing to do with the correspondence, whatever there was?

A. No; Mr. Firth attended to that.

Q. 36. He attended to it all, did he?

A. Yes; he attended to it all.

Q. 37. Have you any knowledge of ever having seen any of the letters in regard to the reconcilement of the accounts of the Fidelity national bank?

A. No; there were probably no letters written except those which I saw this morning.

Q. 38. Have you any recollection of ever having seen them at the time the transactions took place?

A. No; I doubt very much if I saw them.

Q. 39. What has become of Mr. Firth?

A. He is the confidential clerk of the Goelette estate; he is in New York city.

Q. 40. What do you know in regard to the custom of the Fidelity national bank as to sending the reconcilement sheets to your bank?

A. I really know very little about it. Mr. Firth knows a great deal more about it than I do.

Q. 41. You don't know whether they sent the original reconcilement sheets to your bank, or not, personally?

A. Not personally; I don't know.

Redirect examination:

Q. 1. You have stated in your cross-examination that in making the loans you did not rely upon the certificates of deposit. What was it you did rely upon?

A. We relied upon the credit of the bank and upon the collaterals which they sent.

Q. 2. Were those loans made to banks that kept an account with you, or to banks with whom you had no other dealings—the loans of which you have testified?

A. Loans to banks which kept accounts with us.

129 Q. 3. What was done with the money loaned; was it remitted to them, or credited to their account?

A. Placed to the credit of their account on the books of the Chemical national bank.

Q. 4. Then the making of the loan would appear upon the account you sent to the borrowing bank, as it did in this instance?

Objected to as irrelevant and incompetent.

A. Always.

Q. 5. And if you heard nothing with reference to that account, no explanation—did you ever afterwards hear of a bank repudiating the loan?

Objected to as irrelevant and incompetent.

A. We always expected the bank or banks to whom we sent a statement of account to report within a reasonable time any discrepancies, omissions or irregularities of any kind.

Answer objected to as incompetent and immaterial.

Q. 6. You mean the usage between a bank depositing with you

in that regard is the same as that of an ordinary individual keeping a deposit account?

Objected to as incompetent and irrelevant.

A. Always.

GEORGE G. WILLIAMS, of lawful age, being by me first duly cautioned and sworn, as a witness on behalf of the plaintiff, deposes and says as follows:

By Mr. WORTHINGTON:

Q. 1. You are the president of The Chemical National Bank, the plaintiff in this action?

A. I am.

Q. 2. How long have you been connected with the Chemical national bank, and in what capacities?

A. I have been connected with the Chemical bank over 40 years, and was discount clerk, paying teller, cashier and president.

Q. 3. When did you become cashier?

A. I became cashier in 1855.

Q. 4. When did you become president?

A. First of January, 1878.

Q. 5. So that you have been with the bank in those two capacities ever since 1855?

A. Yes—40 years.

Q. 6. Do you know what was the usage as to banks borrowing money prior to the decision of the Supreme Court of the United States in the case of The Western National Bank *vs.* Armstrong, rendered about a year ago last spring?

130 A. I do.

Q. 7. State whether or not it was a usual thing for a bank to borrow money prior to that decision?

A. It was.

Q. 8. How did the borrowing bank make the loan; through what channel?

A. By the rediscount of its bills receivable by its own note secured by collateral or by a certificate of deposit.

Q. 9. Who acted for the borrowing bank?

A. Any of the officers of that bank, president, vice-president or cashier.

Q. 10. I am speaking in my own mind—possibly I have not mentioned the fact—of one bank borrowing from another. Is that what you have been having in your mind in answering?

A. Yes.

Q. 11. Did the lending bank, prior to the decision I have mentioned, ever require any resolution from the board of directors of the borrowing bank as to the authority of the officer of the bank to make the loan?

A. Never. The decisions of the court, in this State, are clear and specific on that point.

Q. 12. You, of course, in your forty years of service, have become familiar with the usages of banks in this city?

A. Yes, sir.

Q. 13. Are you in any way connected with the clearing-house in this city?

A. Yes, sir.

Q. 14. In what capacity?

A. I am now a member of the clearing-house committee, my term of service as president of the clearing-house expiring about a year ago.

Q. 15. How long were you president?

A. The last term two years. The rules of the clearing-house rotate the president every two years.

Q. 16. How long have you personally been connected with the clearing-house in the capacity of an officer of the clearing-house association, or a committee, or otherwise, taking an active part in its affairs?

A. Many years. I could not say exactly.

Cross-examined by Mr. HERRON:

Q. 1. You say it was the custom of banks to loan money to other banks upon the request of either the president, cashier or assistant cashier?

A. Yes, sir.

Q. 2. It made no difference as to the amount of the loan or the officer on whose request it was made, except he should be president, cashier or assistant cashier?

131 A. I said in my testimony, president, vice-president and cashier.

Q. 3. Then change the question in that respect. You don't recognize the assistant cashier, then as one of the officers entitled to borrow money for the bank?

A. We do, provided he is authorized to draw checks on the bank.

Q. 4. Then you say a president, vice-president, cashier or assistant cashier had power to borrow any amount of money for a bank and that other banks would loan it at his request?

A. Provided his signature was forwarded to the bank as an executive officer.

Q. 5. And you did not consider the board of directors at all in the matter?

A. No.

Q. 6. Do you know anything about banks borrowing money for the use of their own banks; have you had any experience in that respect?

A. Banks are borrowers of their depositors. They are borrowing all their deposits, payable on demand from their depositors.

Q. 7. That was not my question as to deposits. My question is about your experience with banks borrowing money from other banks?

A. No, sir.

Q. 8. You know of no case where any bank you were connected with or have known of borrowing money from other banks, except as deposits were made?

Objected to as misleading.

A. I have had no experience in that line.

Q. 9. Either in your own bank or your knowledge of other banks?

A. No, sir; as a borrowing bank.

Q. 10. In the cases where money is loaned to other banks, is it or not usual to take the note of the bank?

A. It was usual to take the note of the bank, secured by collateral or a certificate of deposit, secured by collateral or rediscount their bills receivable.

Q. 11. Why did your bank take a certificate of deposit?

A. A great many banks borrowing money wish to avoid the fact appearing in their statements that they are borrowing money, and a certificate of deposit appears among their liabilities as deposits. That was the reason and is the reason why a great many banks in borrowing money on a certificate of deposit, secured by collateral, rather than to borrow on their own note or on bills receivable. In that way nothing appears in their public statement showing that they are borrowing banks.

132 Q. 12. Was it not understood that the banks had no power to give notes except regular notes for circulation?

Objected to as incompetent and irrelevant.

A. Never.

Q. 13. You never understood anything of that kind?

A. Not under our laws.

Q. 14. Under any laws?

A. The question has been mooted but never—it was settled by decision in the United States court—I think it was in a Baltimore case, by Judge Bond, that banks had a right to give notes. Since then the borrowing has been almost altogether either on bills receivable, certificates of deposit or notes of the bank. Prior to that time, under our State law, there was some question whether banks had the right to give notes other than circulating notes under our State law, from which the United States law was taken.

Q. 15. Did you not know the Comptroller of the Currency had given some intimation of that kind, that they could not give notes except for circulating purposes?

Objected to as incompetent and irrelevant.

A. I know positively from the statement of an ex-Comptroller of the Currency that the question was decided when he was comptroller, and under his direction, that they had a right to give notes.

Q. 16. Before that do you not know of it being decided the other way?

A. No, sir.

Q. 17. Which Comptroller of the Currency was that?

A. It was Mr. Cannon.

Q. 18. Did your bank prefer certificates of deposit to represent the indebtedness to a promissory note of the bank?

A. I don't know that it did. I don't know that we had any special preference in regard to it.

Q. 19. Have you any recollection of your bank ever taking the note of a borrowing bank?

A. Lots of times.

Q. 20. Can you give an instance?

A. I presume I could refer to the books and give a thousand. We prefer that rather than discounting bills receivable.

Q. 21. When I say note of the bank I do not mean a certificate of deposit.

A. I understand you.

Q. 22. But a note of the bank to represent the amount?

A. Yes. What is the question?

Q. 23. Did your bank, in any case, take such a note from the borrowing bank?

133 A. Probably thousands of times.

Q. 24. State whether in any of these cases of the loans you made them the collateral security was equal to or above the amount loaned.

A. The usual custom was to have the collaterals more than the amount of the liability. I presume we have taken notes of banks without collateral, and do it now, take the notes without collateral—a good note without collateral.

Q. 25. In the case where a certificate of deposit is taken do you understand that the money had been deposited in the bank as represented by the certificate of deposit?

Objected to as incompetent and irrelevant.

A. We don't understand anything about it. We take it as it appears.

Q. 26. Is it intended as an acknowledgement of indebtedness to your bank when you advance the money?

Same objection.

A. Yes.

Q. 27. You regard the certificate of deposit then as an obligation on the part of the borrowing bank to your bank if you advanced the money?

Same objection.

A. Yes; beyond any question whatever.

Q. 28. And it is only in that light you look upon it when you advance the money, as the obligations of the bank?

Same objection.

A. We look upon it as a clear, specific and unquestionable obligation of the bank authorized by its custom of doing business.

Q. 29. Were you president of the Chemical national bank at the

time at which the loan was made to the Fidelity national bank, which is in controversy in this case?

A. I was.

Q. 30. Did you participate in the making of that loan?

A. I did.

Q. 31. Who of the officers or officials of the Chemical national bank were instrumental in the making of that loan or joined in the making of that loan to the Fidelity national bank?

A. It was directed, as loans usually are, to the cashier, and he laid it before me and I decided on the loan.

Q. 32. Any other officers of the bank?

A. No, sir.

Q. 33. Then it was a loan made by you and Mr. Quinlan together, as the cashier and president of the Chemical national bank?

A. Yes, sir.

134 Redirect examination:

Q. 1. Was it within the scope of the duties of yourself, as president, and Mr. Quinlan, as cashier, to make loans to borrowing banks?

A. Entirely so.

Q. 2. You have stated on cross-examination that you had no experience as to borrowing banks. I would like to know what you meant by that?

A. No experience in borrowing ourselves.

Q. 3. You mean the banks you were connected with had not been borrowers?

A. Yes.

Q. 4. But you had experience in loaning money to other banks?

A. Yes.

Q. 5. You had had experience with the other end of the line?

A. Yes.

DUMONT CLARKE, of lawful age, being by me first duly cautioned and sworn as a witness on behalf of the plaintiff, deposes and says as follows:

By Mr. WORTHINGTON:

Q. 1. Are you connected with any of the banks in this city.

A. I am president of the American Exchange.

Q. 2. The American Exchange is a national bank, is it not?

A. Yes, sir.

Q. 3. How long have you held that position?

A. About two years as president.

Q. 4. Prior to that time were you connected with any of the other banks?

A. I was vice-president of the same bank.

Q. 5. How many years altogether have you been with the American Exchange national bank?

A. Thirty-three or thirty-four.

Q. 6. Have you ever been cashier of the bank?

A. Assistant cashier for a number of years, and then cashier.

Q. 7. Altogether how long have you been one of the executive officers of the bank, and by executive officers I mean to include president, vice-president, cashier and assistant cashier?

A. Since 1868.

Q. 8. Prior to the decision of the Western National Bank
135 against Armstrong, by the Supreme Court of the United States in the spring of '94—if I recollect right—was it, or was it not, a usual thing for a bank to borrow money?

A. Yes, sir; very common occurrence.

Q. 9. Who acted for the borrowing bank in such a case?

A. At times the cashier, and at times the president, either one of the officers.

Q. 10. Did the lending bank prior to that decision ever require proof of the authority of the officers of the borrowing bank in the shape of a resolution by the directors authorizing the loan?

A. No, sir; we never required anything like that.

Cross-examined by Mr. HERRON:

Q. 1. In what shape was this borrowing made?

A. Usually in the light of rediscounting the bills receivable; at times, however, collateral was furnished to us.

Q. 2 What evidence of such indebtedness was it usual to take?

A. Simply the paper which they had discounted with the endorsement of the bank upon its back; at other times we would take a collateral note made by the bank; at other times a certificate of deposit made by the bank—in the last two cases collateral would be attached to such instruments.

Q. 3. In all such cases did you require collateral where you took the note of the bank or a certificate of deposit?

A. Generally; almost all cases. I would not like to say we made any exception.

Q. 4 What was the custom?

A. The custom was to require collaterals.

Q. 5. For the full amount of the loan or a greater amount?

A. Depending upon the estimate in which we held the bank. Usually we were not particular about it if it covered the note.

Q. 6. What was the reason for taking certificates of deposit instead of the note of the bank?

A. That was merely a choice for the borrowing bank; sometimes they borrowed in that way.

Q. 7. Which was the most common, the transaction of taking a note or rediscounting paper?

A. Rediscounting the straight paper.

Q. 8. And which was the more common, to take certificates of deposit or note of the bank?

A. Note of the bank was more usual than certificates of deposit.

Q. 9. That is your custom?

136 A. Yes, sir.

Q. 10. Have you any knowledge of it outside of the custom of your own bank?

A. No, sir; except in conversation with other bankers we found that was about their own custom and their own rule.

Q. 11. Which?

A. To do just as we did.

Q. 12. Take certificates of deposit or notes?

A. In each way, at the option generally, of the borrowing bank if their account was of sufficient value to allow the option.

Q. 13. Have you had any experience in borrowing from other banks?

A. No, sir.

Q. 14. Either in case of your own bank or other banks borrowing from other banks except where you yourself have made the loan?

A. Not absolutely; of course, in conversations with other bank officers which would naturally take place with associates of that kind we were satisfied they were following about the course which we were following.

ALONZO BARTON HEPBURN, of lawful age, being by me first duly cautioned and sworn as a witness in behalf of the plaintiff, deposes and says as follows:

By Mr. WORTHINGTON:

Q. 1. Are you connected with any of the national banks in New York city?

A. I am president of the Third national bank.

Q. 2. How long have you held that office?

A. About two years and a half.

Q. 3. Prior to that time had you anything to do with the banking business?

A. Immediately prior to that time I was Comptroller of the Currency at Washington. I resigned that position to accept the presidency of this bank.

Q. 4. Before you became comptroller had you any connection with the banking business?

A. Yes; from 1880 to 1884 I was superintendent of the bank department of the State of New York.

Q. 5. Were you ever bank examiner?

A. Yes; I was national bank examiner in the city of New York for something over three years—prior to 1890. I went in with the Harrison administration. I was bank examiner for nearly three years at that time.

Q. 6. Between the time you were State superintendent—I think you said that ceased in 1884?

137 A. I think it was in May or June, 1884.

Q. 7. From that time up to President Harrison's administration were you connected with the banking business?

A. Not at all. Do you mean in an official capacity?

Q. 8. No; I mean in any capacity?

A. No; I was not.

Q. 9. Do you know whether or not it was a usual thing for banks to borrow money from other banks prior to the decision by the Supreme Court of the United States in the spring of 1894 in the case of The Western National Bank against Armstrong?

A. I do; it was usual.

Q. 10. Who acted for the borrowing bank in such transactions?

A. Either of the executive officers; cashier or president.

Q. 11. How about the vice-president?

A. Or vice-president or assistant cashier. Any of the executive officers.

Q. 12. What proof, if any, did the lending bank require as to the authority of the officers of the borrowing bank to make application for the loan?

A. Genuineness of the signature to the application, as well as the correspondence, and they protected themselves by passing the money to the credit of the borrowing bank upon the books of the lending bank, so that it could only be drawn out by the checks of the officers in the regular course of business.

Q. 13. Prior to that decision did the lending bank ever require the passage of resolutions by the board of directors of the borrowing bank directing the making of the loan and authorizing it?

A. I never knew of such an instance. It was not a usual thing at all.

Q. 14. Was or was not the borrowing of money one of the matters that fell within the ordinary scope of the duties of the cashier and vice-president of the bank?

A. It was.

Mr. HERRON: The attorney for the defendant objects to all the foregoing testimony as incompetent and irrelevant.

Cross-examined by Mr. HERRON:

Q. 1. In your personal experience, what shape did the borrowing of this money practically take?

A. Loans were made upon a note—a collateral note, either time or demand, with the bills receivable of the borrowing bank
138 as collateral, with the usual margin of twenty or twenty-five per cent.; also by discounting the receivables of the bank direct by placing the endorsement of the borrowing bank upon the same and having the proceeds passed to their credit at the agreed rate of discount. Money was frequently borrowed also upon certificates of deposit upon a bank with the receivables of the bank put up as collateral for it. That was one of the forms of borrowing which was open to more or less criticism and was made a subject of criticism by myself as supervising officer.

Q. 2. Supervising officer of what; of the State Department?

A. Yes; and also as Comptroller of Currency and examiner. The objection to borrowing upon a certificate of deposit was that the banks borrowing money frequently reported the proceeds of their

loans as deposits instead of bills payable, which, instead of evidencing their weakness by reporting bills payable, they advertised the public confidence in them by increasing the amount of their deposits.

Q. 3. Did they in all such cases require bills receivable or collateral of some kind to secure the loan?

A. Anything was accepted as collateral, such as stocks, bonds, warehouse receipts for grain—anything that the bank was disposed to accept as satisfactory collateral.

Q. 4. But some of the collaterals of this kind were always sent with the evidence of the loan?

A. No; we frequently loaned other banks upon their single name paper without any collateral, and do now. We often loan money without any collateral whatever.

Q. 5. What was the custom?

A. The custom was to require collateral, and it was about equally divided between straight rediscounts and collateral notes.

Q. 6. In these collateral notes you include certificates of deposit?

A. Yes; if taken in that form.

The further taking of depositions under the annexed notice was, by consent, adjourned to tomorrow, the 25th, at 10 a. m.

139 NEW YORK, *October* 25, 1895.

Pursuant to adjournment, parties met.

Present, same as before.

THADDEUS FIRTH, of lawful age, being by me first duly cautioned and sworn as a witness on behalf of the plaintiff, deposes and says, as follows:

By Mr. WORTHINGTON:

Q. 1. Are you connected in any way with the Chemical national bank at the present time?

A. No, sir.

Q. 2. Were you in its employ in the year 1887?

A. I was.

Q. 3. Did you have anything to do with the accounts between the Chemical national bank and the Fidelity National Bank of Cincinnati?

A. Yes, sir.

Q. 4. What?

A. I had charge of reconciling exceptions in the account and the different ledgers under my supervision.

Q. 5. Tell us in what way, what was the practice with reference to reconciling the accounts of the two banks—the course the business took?

A. We furnished the Fidelity national bank a statement from time to time, and if there were any items that did not agree with their books, they wrote us for information; that is, we received a request from time to time for information on certain items which would be a better explanation of it, perhaps.

Q. 6. And you made answers to those requests how?

A. By reporting.

Q. 7. What I want to get at is whether you kept here the letter the Fidelity national bank wrote you, and wrote back to them upon an independent sheet, or whether the correspondence took any other course than that?

A. There was no fixed rule; but in the usual course we frequently returned letters with the information required connected on the same sheet with the request.

Q. 8. Look at the letter which I now hand you, being one offered in evidence in this case, from W. B. McCauslen, a witness, and marked "Letter as to reconcilement of April account." The letter bearing date Cincinnati, 5–12–'87, meaning May 12, 1887, addressed to W. J. Quinlan, cashier, and state whether that is one of the letters to which you have referred?

140 A. Yes, sir.

Q. 9. Is any part of the writing upon those two sheets of paper composing that letter, yours?

A. Yes, sir.

Q. 10. What part?

A. The reply on the second sheet is in my writing.

Q. 11. Beginning with what date?

A. Dated May 19, 1887.

Q. 12. How about any of the explanatory notes on the right-hand side of the first sheet?

A. Those are also in my handwriting.

Q. 13. And the explanatory part on the right-hand side of the top of the second sheet?

A. Those also appear to be in my handwriting.

Q. 14. I hand you another document that has already been offered in evidence by Mr. McCauslen as a witness, marked "Letters as to difference in May reconcilement," to which is pinned, as it now appears, a statement prepared by the Fidelity national bank, called "Reconcilement sheet for May," which has been offered in evidence. The letter itself is without any specific date; it is headed "Chemical national bank, New York; May reconcilement in account with Fidelity national bank." I will ask you whether the letter is one of the series of letters to which you have heretofore referred, and whether, when that letter came to you, the May reconcilement sheet that is attached now to the letter, was with it?

A. I can't say from recollection whether it was attached or not; but my recollection is that they never sent on a full reconcilement sheet—or I might add in addition it was not their course, from my recollection, to send on a sheet.

Q. 15. The other branch of my question was whether the letter itself is one of those letters relating to the reconcilement of accounts?

A. It is.

Q. 16. Please indicate what part of the letter as it now appears, or the writing upon the sheet, is yours?

A. The pencil memorandums on the right-hand side appear to be

in my handwriting, and the ink memorandum at the bottom of the sheet, with the exception of this endorsement on the last line.

Q. 17. The descriptive endorsement, you mean, "Letter as to difference, etc."?

A. Yes, sir.

Q. 18. When you say on the left-hand side, the ink at the bottom, do you mean that part below the signature "Hicks" down to the words "Credit June 2nd, 1887"?

141 A. Yes, and this on the right side.

Q. 19. On the upper part of the right-hand side of the sheet there are a series of numbers, 1, 2, 3, 4, 5, 6, 7 and 8, put there for reference apparently in comparison with the notations, and down below with a cross-checker-board mark on top of it. *And* those numbers on the upper part of the sheet in your handwriting?

A. They appear to be.

Q. 20. I hand you a letter which has been introduced in evidence in this case upon the letter-head of the Chemical national bank, bearing date May 11th, 1887, and marked and offered in evidence "Letter from Quinlan to M. I. Baldwin, May 11, 1887, E. B. R., special examiner," and ask you if you know in whose handwriting that letter is?

A. It is my handwriting.

Q. 21. Also another letter upon the same style of letter-head heretofore offered in evidence and marked "Letter from Quinlan to Baldwin, May 18th, 1887," that being the date of the letter, and ask you in whose handwriting, if you know, that is?

A. That is my handwriting.

Q. 22. Were you, at the time those letters were written, in the employ of the Chemical national bank?

A. Yes, sir.

Q. 23. I hand you another paper that has been offered in evidence in this case, being upon the letter-head of David Armstrong, receiver of the Fidelity national bank, bearing date Cincinnati, July 12, 1887, and marked and offered in evidence "Armstrong letter to Chemical national bank, July 12, 1887," and ask you if that is one of the letters relating to differences in the accounts to which you have testified?

A. Yes, sir.

Q. 24. Are there any things in the letter which are in your handwriting?

A. The pencil memoranda appear to be in my handwriting.

Q. 25. On each of these papers which I have handed you, which relate to the reconcilement of accounts, there is a stamp, which says, "Please report by number or date of letter." Have you any recollection as to whose stamp that was, whether of the Fidelity national bank or the Chemical national bank?

A. My recollection is it was not our stamp; I don't think we had at that time anything like that.

Q. 26. Then, on this letter, which I hand you, dated May

142 12th, 1887, there is another stamp, "Does this belong to us." Do you know anything about whose stamp that was?

A. I think that was not a Chemical stamp.

Q. 27. Have you any recollection independent of papers or documents as to whether the Chemical national bank received any letter from the Fidelity national bank with reference to differences between them in account currents, for the business of March, 1887?

A. No, sir; I could not recall any particular month.

Q. 28. I hand you now a paper which has already been offered in evidence, when Mr. McCaul-en was on the stand, marked "Reconcilement sheet of Chemical national bank, March 18th, 1887," purporting to be a statement made out in the Fidelity national bank of the differences between the accounts as kept in the Fidelity national bank, and as furnished the Fidelity national bank by the Chemical national bank, as they stood at the time the account for March was furnished by the Chemical national bank, and ask you whether, on looking on that sheet, it would refresh your memory—anything there as to whether the Chemical did receive any letter relating to these differences or any of them?

A. Nothing in here that will enable me to recollect definitely.

Q. 29. Is there anything upon the reconcilement sheet that I have just handed you to indicate whether or not it had ever been sent by the Fidelity national bank to the Chemical bank—the sheet itself?

Objected to as irrelevant and incompetent.

A. Not an indicatiou here that I can see of its ever having reached the Chemical national bank.

Q. 30. I hand you another paper that has been offered in evidence, when Mr. McCaulsen was on the stand, and which is marked "Attempted reconcilement of June account, E. B. R., special examiner," and ask you if there is anything on that paper to indicate that it has ever been in the possession of the Chemical national bank?

A. I don't trace any markings here to show that that reached the Chemical national bank.

Q. 31. When did you leave the employ of the Chemical national bank?

A. June, 1889.

Cross-examined by Mr. HERRON:

Q. 1. Have you any present recollection as to the matters of the reconcilement of accounts between the Fidelity national bank and the Chemical national bank, in March, April or May, 1887?

143 A. Nothing special.

Q. 2. Have you any recollection at all?

A. No, sir.

Q. 3. Have you any personal recollection as to the custom of the Fidelity national bank in this matter, at all?

A. I have.

Q. 4. State now what do you recollect?

A. I recollect that they wrote on occasionally for a report on items to reconcile their account.

Q. 5. Was it referred to you?

A. That was referred to me.

Q. 6. And you examined them?

A. I examined and secured the information as far as possible.

Q. 7. Do you remember when that was?

A. I don't remember the particular date, no, sir.

Q. 8. Was it your custom to attend to the reconcilement of accounts of the Chemical national bank against other banks?

A. Yes, sir.

Q. 9. What was the course you took in reconciling the accounts when another bank rendered you a statement of their account?

A. When other banks rendered a statement of their account, I checked off the items and traced those that agreed with our books, and then brought up the exceptions making proof as between their balance and our balance.

Q. 10. What was your mode in checking? Did you do the work yourself, or did you have some person to help you?

A. I did it myself part of the time, and also had an assistant.

Q. 11. When you had assistance, in what way would that be done?

A. My recollection is that one would call off and the other would check; for instance, one to check off from the account received and the other would check on the ledger; check all the items that agreed and that the others would be brought up as exceptions for tracing.

Q. 12. What would the one who had the ledger call off?

Objected to, as it assumes he was the one that called.

Q. 13. Would he call anything more than the item of figures in the column of charges or credits?

A. Not unless it was necessary. If the figures agreed in the ordinary chronological order, why, there was nothing more required.

144 Q. 14. Then either one or the other would call off the figures in the column, and the other, if it corresponded, would check?

A. Yes, sir.

Q. 16. Is that the customary way of reconciling accounts between banks?

A. I believe it is; of course I know nothing outside of the Chemical and the ordinary reports that came in to confirm that course.

Q. 17. So that your impression is that that is the custom which existed in reconciling accounts between banks?

A. Yes. As far as calling off is concerned, that I don't know; but as far as reconciling and getting proof of it, that I believe to be the course.

Redirect examination:

Q. 1. Mr. Herron, in his questions to you, has asked you whether the clerk who had the ledger of the bank to whom the account was furnished, was the one who did the calling off?

A. There was no rule. It was a matter of convenience, and in many cases there was no calling off. It was simply one person checked off. I checked off a large number of them personally without aid.

Q. 2. You understand, of course, that the question that was put to you by Mr. Herron was not the case of the Chemical national bank rendering accounts to another bank as you did with the Fidelity, but the reverse?

A. Yes. Accounts received by the Chemical bank from other banks.

Q. 3. I understand also that you are not speaking as to the practice pursued in other banks, but the course pursued in the Chemical?

A. Yes, in the Chemical.

Q. 4. As to calling off?

A. Yes. sir.

Q. 5. Only you know generally that the banks do check off the accounts when they receive them to make sure they are reconciled?

A. Yes; the fact of receiving in some cases of perfect proof reconcilement.

Q. 6. By proof reconcilement you mean such a one as these long sheets we have handed you here today?

A. Yes; only some are shorter and quite brief; where there are few exceptions it requires very short proof.

Q. 7. That depends upon the number of differences in the account?

A. Yes; showing their balance and our balance and
145 the difference would make a complete proof.

Q. 8. Supposing in checking off, or, rather, supposing in these accounts it would appear that there was not merely a difference in the item in the account, I mean to say in dollars and cents, but there was a difference in the written part of the item, instead of being cash, for example. It might be cash in one place, for example, and something else, bills receivable, or something of the sort, upon the other; what I want to get at is, would you, in checking it off—would you be content in simply calling the numbers, or would the item itself be read?

A. The amount would follow in order without there was some special feature to call attention to it, and that would cover all the reconcilement.

Q. 9. What would you call a special feature to require attention?

A. If there was a wrong memorandum that did not seem to be in accordance with the facts; for instance there might be one hundred dollars credit under the name of Smith, or we had it Rogers; we would look that up because it might conflict with some other item.

Q. 10. How would you find out if the written part of the account conflicted with the ledger—what would you do?

A. The ledger shows merely the money, simply the amount, but the amount was taken from the cash book or credit book, and we could refer to that and then further to perhaps the collection ledgers and probably to other books and trace it.

Q. 11. How would the two persons who were checking reach the conclusion that there was something to be looked up; that there was a discrepancy there?

A. Nothing more than observing.

Q. 12. Would they both look at the account?

A. Not to look; no.

Q. 13. I am putting the case in carrying the account down you find the amount was $3,000 charged up by one bank on a certain date and entered upon the books in the other bank one, two or three days, as course of mail would require, the amount might agree, but the written explanation of the amount that would be in the books would not ageee, it would be different in the two banks. Now what I want to get at is whether, suppose such a difference did occur, it would be right—if it was brought to the mind of one or the other there would be an attempt to search and find out why that discrepancy occurred?

146 A. No; not in the calling off; that would be in the final reconciling; we usually glanced over the sheet, and if anything catches our eye it would be shown in that way so that there was no certainty one way or the other.

Q. 14. Then the calling off was not the whole business of reconciling?

A. No; that was simply getting it into shape for the final closing.

Q. 15. Whose business was it in the case of the Chemical national bank to attend to that?

A. I usually made the final proof.

Q. 16. What did you do with reference to that in making a final proof; what is the business or duty of the man who has the final proof to do in such cases?

A. He has to reconcile the items that were brought up as exceptions, and those he cannot do at once he has to secure information of and trace later.

Q. 17. You mean he is supposed to have such general familiarity with the business of the bank that on looking over the account he would see if there was anything there that should strike attention?

Objected to as incompetent and irrelevant.

(Not answered.)

Q. 18. What I wish to know is whether the person who has charge of the reconcilement of the accounts pays attention to anything upon the account that is furnished him except the figures; when I say whether the person does do so I mean to say whether it is the proper performance of his duty to look at anything except the figures?

Objected to as incompetent and irrelevant.

A. In making an examination of a statement received a person cannot very well check the figures without seeing something of the balance of the statement, and I always consider that it is the proper

course to note anything that would indicate a difference between the account received and the account at the bank.

Answer objected to.

Q. 19. What would suggest itself to the mind of the person having charge of the reconciling of accounts beyond the looking it over as indicating that there might be a difference between the account received and the account of the bank aside from the matter of figures?

Objected to as incompetent and irrelevant.

A. There are so many possibilities that one could hardly tell what it would be. I might suggest a case where there was some long explanation that we received, and in which there was a different date in the statement, which would naturally call your attention to it and you would trace it to see whether your records agreed with their statement.

147 Recross-examination:

Q. 1. In the question I asked before, as to where there are two persons engaged in reconciling the account whichever one called out, whether from the account of the other bank or from the ledger in your bank, he would call out the figures simply, from the one who was calling off, would he not? I mean the figures in the column of amounts.

A. That would be the usual course in checking from the ledger, but we had some statements that included collection notes, and in those cases they would cover only the name of the maker.

Q. 2. That is, if a piece of paper was put down as collected for one person, when, according to your books, it was collected by another person, then you would note that difference?

A. I would be apt to consider it.

Q. 3. If the figures in the two accounts agreed they would be checked off, would they not, and there was no such difference as you have suggested, then you would check them?

A. If they ran in order and agreed as to amount; the inference would be that they agreed and it would be checked.

Q. 4. In coming to the final proof of reconcilement you would not take into consideration again the items which had been checked?

A. No, sir.

Redirect examination:

Q. 1. What do you mean by that, that you would not take into consideration items which had been checked?

A. The items checked had agreed between their account and our ledger, and there was no necessity for bringing them up as any exception or difference; the one offset the other; it was like a cancellation.

Q. 2. Supposing that in going over for the final reconcilement

after the checking you came across one of those instances to which you alluded before, and on both the figures agreed, and there was something upon the other part of the account to strike your attention as probably not what appeared upon your books you understood it was, that in such a case as that, that the matter would rest with the checking without any further examination?

A. No; if there was anything that called my attention or did not seem to be in order and correct, I would trace it up and verify it, and if I could not verify it by our books I would write for information.

148 Q. 3. Did you ever have a case in which accounts were rendered to you where the bank rendering the account charged your bank with a loan, and your books did not show any such loan?

A. In the accounts rendered to us?

Q. 4. Yes.

A. No, sir; I have no recollection.

Recross-examination:

Q. 1. If you found such a matter of that kind, the account of a loan to the Chemical national bank, and your books did not show such a loan, you would regard it as your duty to go to the board of directors, would you not?

A. I think I should have mentioned the matter to the cashier at once.

Redirect examination:

Q. 1. Why do you say you would mention it to the cashier?

A. The cashier is considered the business head of the office, and if he was present I should have it referred at once to him; if he was not present, the president would have been the course.

Q. 2. The cashier in the ordinary course is the channel of communication between subordinate clerks and the board of directors, is he not?

Objected to.

(Not answered.)

Q. 3. Do I understand, then, that the cashier is the ordinary channel of communication between the subordinate clerks and the officers of the bank?

A. The cashier is an officer of the bank.

Q. 4. But the cashier is the person to whom the subordinate clerks report in the ordinary course of business?

A. Yes, sir.

Recross-examination:

Q. 1. And if you made a statement to the cashier or president, then it might be you considered that your duty then ended?

A. Yes, sir.

EDWARD TOWNSEND, of lawful age, being by me first duly cautioned and sworn as a witness on behalf of the plaintiff, deposes and says as follows:

By Mr. WORTHINGTON:

Q. 1. Are you connected in business with any of the national banks of this city?

149 A. Yes, sir; with the Importers' & Traders'.

Q. 2. What position do you hold?

A. Cashier.

Q. 3. How long have you held that position?

A. Over fifteen years.

Q. 4. Do you know whether or not prior to the decision of the Supreme Court of the United States in the case of The Western National Bank against Armstrong, in the spring of 1894, it was usual for a bank to borrow money?

A. It was.

Q. 5. Who acted for the borrowing bank whenever it desired to borrow money?

A. Any official whose signature was authorized with us.

Q. 6. And what officials was it customary to give authorization to for signature?

A. Generally the president and cashier, and frequently the vice-president and assistant cashier, also.

Q. 7. Did the lending bank prior to that decision ever require proof of authorization to make the loan in the form of a resolution of the board of directors of the borrowing bank?

A. Never to my knowledge.

Q. 8. What forms did such loans usually take; I mean what evidence of indebtedness?

A. Generally they were the endorsement of the bank by one of its officers, with notes and rediscount of their bills.

Q. 9. You mean rediscount of paper made for the occasion?

A. Usually it was rediscounted; at times it was the other way with paper and collateral.

Q. 10. And certificates of deposit?

A. Oh, occasionally but not often.

Cross-examined by Mr. HERRON:

Q. 1. In all such cases you required collaterals, did you?

A. Not all.

Q. 2. Where it was not rediscounted paper?

A. Generally; there may have been some exception.

Q. 3. What has been the custom since the decision of the Supreme Court?

A. No change, so far as we are concerned.

Q. 4. You did not make any change at all?

A. No, sir.

Q. 5. The Supreme Court decision has not affected you a particle?

A. Not at all.

150 GEORGE F. BAKER, of lawful age, being by me first duly cautioned and sworn as a witness on behalf of the plaintiff, deposes and says as follows:

By Mr. WORTHINGTON:

Q. 1. You are the president of the First national bank of this city?

A. I am.

Q. 2. How long have you been connected with that bank?

A. Over 30 years.

Q. 3. And in what position?

A. Teller, cashier and president.

Q. 4. Do you know whether or not prior to the decision of the Supreme Court of the United States in the case of The Western National Bank against Armstrong, decided about a year ago last spring, it was a usual thing for a bank to borrow money from its correspondent bank?

A. Yes.

Q. 5. Who acted for the borrowing bank when a loan was to be made?

A. Any of its officers.

Q. 6. When you say any of its officers, whom do you class as officers?

A. Generally the president or cashier, and occasionally a director.

Q. 7. How about the vice-president?

A. The vice-president; yes, sir.

Q. 8. In such cases did the lending bank require the proof of authority of the officer of the borrowing bank making application for the loan in the form of a resolution of the board of directors authorizing the making of the loan?

A. No, sir.

Q. 9. Your bank itself has had some litigation with Armstrong, the receiver of the Fidelity national bank, has it not?

A. Yes, sir.

Q. 10. Is the litigation over now or not?

A. I don't know.

Cross-examination by Mr. HERRON:

Q. 1. You made two or three loans to the Fidelity national bank, I believe, during its existence?

A. I don't remember how many loans we made to them.

Q. 2. For a pretty large amount?

A. Yes, sir.

151 Q. 3. What has been the custom here with banks since the decision of the Supreme Court of the United States?

A. In what regard?

Q. 4. As to requiring resolutions of board of directors?

A. I am only speaking generally of our own bank. We require a resolution.

Q. 5. You require a resolution of the board of directors authorizing an officer to borrow money?
A. Yes, sir.
Q. 6. Do you not know that that is not the general custom in the banks, so far as you know?
A. I think so.

Redirect examination:

Q. 1. The loans which you had made to the Fidelity national bank were the occasion of the litigation that I referred to?
A. Yes, sir.
Q. 2. Did they result in the payment of the whole or any part of those loans to your bank?
A. The loan was paid in whole or in part.
Q. 3. Do you know whether, in the case of your bank, the loans which you made to the Fidelity, there was any resolution of the Fidelity board of directors authorizing the loan?
A. No, sir.

Recross-examination:

Q. 1. What do you mean by "no, sir"?
A. I don't think there was any resolution.
Q. 2. Do you know anything about it at all, whether there was or not a resolution?
A. I don't know of any resolution; no, sir.

FREDERICK D. TAPPAN, of lawful age, being by me first duly cautioned and sworn as a witness, on behalf of the plaintiff, deposes and says as follows:

By Mr. WORTHINGTON:

Q. 1. You are the president of the Gallatin national bank?
A. I am.
Q. 2. How long have you been connected with that bank?
A. 45 years.
Q. 3. In what capacities?
152 A. Officer for 38 years and clerk for 7 years.
Q. 4. Prior to your being president, what other offices did you hold?
A. In the bank?
Q. 5. Yes.
A. I was cashier.
Q. 6. How long have you been president?
A. I've been president 27 years.
Q. 7. Do you know whether or not, prior to the decision of the Supreme Court of the United States in the case of The Western National Bank against Armstrong, which was decided about the spring of 1894, it was the usual thing for one bank to borrow money from another bank with whom it had correspondence?
A. Oh, yes.

Q. 8. In the making of such loan, who acted for the borrowing bank?

A. Either the cashier or president.

Q. 9. How about the vice-president?

A. The vice-president, in the absence of the president. In some cases the vice-president is the more active man; not usually, but there have been cases where the vice-president has been the more active man of the two.

Q. 10. And in such cases he would be the person naturally to act?

A. Yes, sir.

Q. 11. In making such loans, did the loaning bank require proof of the authority of the officer of the borrowing bank making the application, by a resolution of the board of directors, prior to this decision of which I have spoken?

A. I think not.

Q. 12. When you say you think not, how positive is your information upon this point?

A. That they never have required a resolution of the board of directors of the borrowing bank.

Q. 13. How were the loans ordinarily evidenced?

A. By note usually, or by a note with securities attached.

Q. 14. How about certificates of deposit of the borrowing bank?

A. And occasionally—I don't know how frequently that has been done. We have done it ourselves by loaning on a certificate of deposit of the bank.

Cross-examined by Mr. HERRON:

Q. 1. To whose order would that certificate of deposit be drawn?

153 A. It would be drawn to the order of the lending bank.

Q. 2. Have you changed your rule on the subject of lending money to other banks since the decision of the Supreme Court?

A. No, sir.

Q. 3. You do not even now require any authority from the board of directors?

A. No, sir.

Q. 4. Notwithstanding the decision of the Supreme Court?

A. No, sir.

Q. 5. In all such cases you require collateral, do you?

A. No, not always. It depends entirely upon the credit of the bank or the institution's desire to make the loan or to borrow the money.

Q. 6. In the majority of cases, is or not that required?

A. I can only speak with reference to my own bank. In the majority of cases with us, the borrowing bank usually rediscounts paper or puts up some security with the bank.

Q. 7. Are not these loans generally in the way of rediscounting paper?

A. I should think they were; they are with us.

Redirect examination:

Q. 1. You say that since the decision to which I have referred, the bank has not changed its practice in the matter of requiring a resolution of the board of directors?

A. Yes.

Q. 2. Did the bank take legal advice upon the question?

A. No, sir.

THE STATE OF NEW YORK, *New York City and County,* } ss:

I, Julius W. Rotchild, a notary public in and for the county and State above named, duly commissioned and qualified, do hereby certify that the above-named Wm. J. Quinlan, Jr., George G. Williams, Dumont Clarke, Alonzo Barton Hepburn, Thaddeus Firth, Edward Townsand, Geo. F. Baker and Fred D. Tappan, were by me first severally sworn to testify the truth, the whole truth, and nothing but the truth, and that the depositions hereunto being annexed (subscription being waived) as above set forth, were taken in shorthand and a transcript of such shorthand testimony was written out by typewriter under my direction; and were continued from day to day, as above set forth, that said depositions were duly taken by me pursuant to and at the time and place and within the
154 hours specified in the notice hereto attached, and that I am not counsel, attorney or relative of either party or otherwise interested in the event of this suit.

I further certify that all of said witnesses live more than 100 miles from place of trial; and *was* at the time of so taking the said depositions.

In testimony whereof I have hereunto set my hand and official seal, this first day of November, A. D. 1895.

[SEAL.] J. W. ROTCHILD,
Notary Public, 79, City and County of New York.

Cost Bill.

Total cost of taking depositions—stenographer and notary, $110.00.

And afterwards, to wit, on the 1st day of June, A. D. 1896, the following testimony was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Testimony.

THE UNITED STATES OF AMERICA, *Southern District of Ohio, Western Division,* } ss:

The President of the United States of America to Effie V. Ryan, Cincinnati, Ohio, Greeting:

Know ye, that we, in confidence of your prudence and fidelity, have appointed you special examiner, and by these presents to give

you full power and authority diligently to examine upon his (or their respective) corporal oath (or affirmation), before you to be taken, sundry persons as witnesses on the part of the parties in a certain cause now pending undetermined in the circuit court of the United States of America, for the western division of the southern district of Ohio, in the sixth circuit, wherein The Chemical National Bank of New York is complainant, and David Armstrong, as receiver of the Fidelity national bank, is respondent, touching the premises (or if interrogatories are annexed, on the interrogatories hereunto annexed).

And we do further empower you to examine on the same behalf and in like manner, any other person or persons who may be produced as witnesses before you.

155 And we do hereby require you, before whom such testimony may be taken, to reduce the same to writing, and to close it up under your hand and seal, directed to Benjamin R. Cowen, clerk of the circuit court of the United Stated, southern district of Ohio, western division, Cincinnati, Ohio; and that you return the same when executed as above directed, annexed to this writ, with the title of the cause indorsed on the envelope of the commission, into the said circuit court, before the judge (or judges) thereof, with all convenient speed.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Cincinnati, in the said division and district, this 17th day of September, A. D. 1895, and in the 120th year of the Independence of the United States of America.

Attest:

[SEAL.]

B. R. COWEN,
Clerk U. S. Circuit Court, S. D. O.,
By ROBERT C. GEORGI,
Deputy Clerk.

In the United States Circuit Court, Southern District of Ohio, W. D.

THE CHEMICAL NATIONAL BANK OF NEW YORK
vs.
DAVID ARMSTRONG, Receiver of the Fidelity National Bank of Cincinnati. } No. 4339.

Pursuant to the foregoing notice, the following depositions were taken at the offices of David Armstrong, in the Masonic temple; John W. Herron, in the United Bank building; Wm. Worthington, in the Wiggins block, room 310 Government building, and office of Henry Pogue, No. — West Fourth street. All in Cincinnati, Ohio, on the 18th day of September, 1895; on the 19th day of September, 1895; 11th day of November, 1895; the 3rd day of February, 1896; the 10th day of February, 1896; the 4th, 5th and 6th days of May, 1896.

156 The United States Circuit Court, Southern District of Ohio, Western Division.

THE CHEMICAL NATIONAL BANK OF NEW YORK, Plaintiff,
vs.
DAVID ARMSTRONG, as Receiver of the Fidelity National Bank of Cincinnati, Defendant. } No. 4339.

Testimony on Behalf of Plaintiff,

Taken at the office of David Armstrong, Esq., receiver of the Fidelity national bank, room No. 9, Masonic temple, Third and Walnut streets, Cincinnati, Ohio, on Wednesday morning, September 18th, 1895.

Appearances:
For plaintiff, Hon. William Worthington.
For defendant, Hon. John W. Herron.

WILLIAM BEATTY MCCAUSLEN, called on behalf of plaintiff, being first duly sworn, testifies as follows:

Direct examination by Judge WORTHINGTON:

Q. 1. Mr. McCauslen, what position, if any, do you hold under the defendant in this case? Mr. Armstrong, the receiver of the Fidelity national bank?

A. I am his book-keeper, and had been in his employ since shortly after the failure of the Fidelity national bank, in June, 1887.

Q. 2. Have you charge, for him, of the books and papers of the Fidelity national bank?

A. Yes, sir; I have.

Q. 3. Mr. McCauslen, will you please produce the book of minutes of the board of directors and stockholders of the Fidelity national bank?

A. Yes, sir; I have it here. (Hands minute book to counsel.)

Counsel for plaintiff offers minute book in evidence, and asks that the minutes shown from the first meeting of the board of directors, held on February 25th, 1886, on page 15 of the book down to, and inclusive of, the minutes of the meeting of May 10, '87, found on pages 43 and 44 of the book, be copied by the
157 special examiner, and attached to this deposition, marked "Exhibit 'Minutes' to W. B. McCauslen's Testimony."

Q. 4. Mr. McCauslen, please examine this book (minute book) and see if there are any minutes in it after those of May 10, 1887, found on pages 43 and 44?

A. (After examining.) No, sir; there appear to be no records made after that date in the minute book.

Q. 5. Now, Mr. McCauslen, will you please produce the reconcilement sheet of the account current between the Fidelity national bank and the Chemical national bank of New York?

A. Yes, I have it in my hand (hands it to counsel).

Paper offered in evidence by counsel for plaintiff, hereto attached and marked "Reconcilement sheet for Chemical national bank, March, 1887, Effie V. Ryan, special ex'r."

Q. 6. Mr. McCauslen, have you, in the course of your duties, acquired such familiarity with the handwriting of the clerks of the Fidelity national bank, as to enable you to state in whose handwriting this reconcilement sheet is?

A. Yes, I believe so. I believe it to be in the handwriting of Edward Hicks.

Q. 7. Is he living or dead?

A. He is now dead.

Q. 8. Can you explain to us what this sheet is, or what it shows?

A. It purports to show the difference existing in the account as rendered to the Fidelity by the Chemical national bank, and the account of the Fidelity for the month of March, 1887.

Mr. HERRON:

Q. The differences between what?

A. Between the two banks.

Judge WORTHINGTON:

Q. 9. Now, let me illustrate it: It begins at the left-hand upper corner with the words, "We charge," and then there are the several entries under that; now, do I understand you to mean that these entries under "We charge" are entries that are charged upon the books of the Fidelity national bank, but are not upon the books of the Chemical national bank, as shown by the account current rendered by the Chemical?

A. Yes, sir.

Q. 10. And so, *per contra*, the items under the words "You
158 charge," are items which appear upon the books of the Chemical national bank, but not upon the books of the Fidelity national bank?

A. Yes, sir; we might say, "You charge, and we do not credit."

Q. 11. And upon the other side, "We credit"—that means we credit and you do not charge?

A. Yes, sir.

Q. 12. And down below that, "You cr.," means you credit and we do not charge?

A. Yes, sir.

Q. 13. What was the usual course of business after the making out of such a reconcilement sheet?

A. I don't know that I could testify competently to that.

Q. 14. I mean so far as you have discovered from your examination of the books and papers?

A. Yes, these were, of course, adjusted; then if there were any differences existing in the account, they were adjusted in the course of business on the books of the two banks.

Q. 15. Was it the custom of the Fidelity national bank to make any report to the Chemical national bank of the reconcilement sheet?

A. Yes, sir; I suppose it was.

Q. 16. Mr. McCauslen, are you able to state from your knowledge by the papers, when that report was made, what was done with that report? The report would, of course, be in writing from the Chemical national bank to the Fidelity national bank in Cincinnati?

A. Yes, I suppose it would be.

Q. 17. Well, don't you know?

A. I know that there are reports in writing covering some months endeavoring to adjust these differences.

Q. 18. Taking the form of a letter from the Fidelity bank to the Chemical?

A. Yes, sir.

Q. 19. And the return of the same letter, with the answer of the Chemical written upon it?

A. Yes, sir; there are such letters here.

Q. 20. Mr. McCauslen, have you made search through the books and papers of the Fidelity national bank, to find such a letter with reference to this March account (reconcilement sheet already offered in evidence)?

A. Yes, sir; I have made such a search.

Q. 21. Thoroughly?

A. Yes, I have made a thorough search for it.

Q. 22. And have you been able to find anything with reference to the March account, except this reconcilement sheet which
159 is now before you?

A. No, sir; I have not.

Q. 23. Mr. McCauslen, the fractional figures that appear in these entries give, I presume, the month, as the numerator, and the day of the month as the denominator (referring to 3–1, etc., in the first column of reconcilement sheet)?

A. Yes, sir; I believe those figures refer to the dates.

Q. 24. Take the first one, for instance, under the head "We charge;" 1–3, 46881, and then carried out, 362; that means, we charge, upon March 1st, and what does the 46881 mean?

A. That refers to the number of the collection.

Q. 25. And then the 362 would be the amount of the collection of the item, would it?

A. Yes, sir.

Q. 26. Then, the next 3–2 means March the second—error?

A. Yes; that means the difference arising from an error—eighty-six (86c.) cents.

Q. 27. And so through the other entries?

A. Yes, sir.

Q. 28. Now, on the inner page, the second page, of this reconcilement sheet, are sundry entries, beginning, on the extreme left-hand column with the figures 3280; and, then, in the column that is ordinarily used for dollars and cents, appears "100," and——

A. Those figures refer to the drafts outstanding at the time the statement was made; the numbers of the drafts and the amounts.

Q. 29. The numbers and amounts of the drafts drawn by the Fidelity national bank on the Chemical national bank, or *vice versa*?

A. Drawn by the Fidelity national bank upon the Chemical national bank.

Q. 30. Mr. McCauslen, have you found a reconcilement sheet for the account for the month of April, 1887?

A. Yes; I have it here in my hand.

Paper offered in evidence by counsel for plaintiff, hereto attached and marked, "Reconcilement sheet for April, 1887; E. V. R., special examiner."

Q. 31. The explanation you have given with reference to the reconcilement sheet for March applies equally to this reconcilement sheet for April, I presume, Mr. McCauslen?

A. Yes, sir; as to form, etc.

Q. 32. Mr. McCauslen, there was pinned to this reconcile-
160 ment sheet for April, as you handed it to me, a letter upon the letter-head of the Fidelity national bank, dated "Cincinnati, 5–12, 1887; addressed to W. J. Quinlan, cas., N. Y.," two sheets; stamped "Fidelity national bank, per Watters," on the second page; and written underneath it, under date of "N. Y., May 19, '87," is an answer signed "W. J. Quinlan, Jr.," with sundry stamps and notations upon the letter, and comments. Is this the letter of advice for the April account that you have spoken of as having been found by you among the papers of the Fidelity national bank?

A. Yes, it is. This appears to be a letter written by the Fidelity to the Chemical national bank, noting differences and omissions, etc., found in reconciling the April account as rendered to the Fidelity national bank by the Chemical national bank.

Letters referred to offered in evidence by counsel for plaintiff, hereto attached, and marked "Letters as to reconcilement of April account, E. V. R., special examiner."

Q. 33. Mr. McCauslen, there is stamped on this letter the words: "Does this belong to us?" Are you able to say whether that is the stamp of the Fidelity national bank, or the stamp of the Chemical national bank—which bank is it?

A. No, sir; I am not able to say that. There are so many of these stamps used by the banks.

Q. 34. As against the line "You cr. 4–6, meaning, April 6th, 168.99." there appears in a different handwriting "5–18, meaning May 18," I presume, "your chg. 4–9 & fees 167.58" and "1.41" beneath it; do you know whether those words "your chg." etc.—are in the handwriting of the clerks of the Fidelity, or of the Chemical national bank?

A. It is in a different handwriting from the Fidelity's letter, and was likely written by the clerk in the Chemical—corresponding with the handwriting at the end.

Q. 35. It is the explanation of the inquiry asked by the Fidelity?

A. Yes, sir.

Q. 36. And so with the other similar entries underneath, written on the right-hand side of the page?

A. Yes, sir.

Q. 37. Mr. McCauslen, have you found the reconcilement sheet for the account current for the month of May, 1887?

A. Yes, sir, here it is.

Paper offered in evidence by counsel for plaintiff, hereto attached, and marked, "Reconcilement sheet for May, E. V. R., special examiner."

161 Q. 38. As you hand this to me, Mr. Causlen, there was pinned to it a part of a sheet of account paper, headed, "Chemical, New York, May reconcilement; in account with the Fidelity National Bank of Cincinnati." I will hand that paper to you, and ask you if that is the letter of advice from the Fidelity national bank, to the Chemical national bank, relating to the May account; similar to the letter of advice you have produced with reference to the April account.

A. Well, I don't believe I could identify that as a letter. While it is true there are notations made on there apparently by the Chemical national bank, or some clerk there, I don't believe I could say that was a letter similar to the other one.

Q. 39. I call your attention to the writing in the body of it, Mr. McCauslen: "Will you kindly see what this difference of 20.00 in our letter of 4–5th. Please return this sheet with your reply, and oblige Fidelity." Who is that signed by?

A. Hicks. That is referring to this item here (indicating), I take it, $20.00; and asking that they explain that item, and see what the difference is.

Q. 40. My question, Mr. McCauslen, is whether you call that a letter, or not—or, whatever, name you give it—is that a statement rendered by the Fidelity national bank to the Chemical national bank, of the differences between the account as kept upon the books of the Fidelity national bank and as rendered by the Chemical national bank for the month of May, 1887, after the comparison by the two—is it such a statement of differences?

A. Yes, sir; it seems to be such a statement.

Q. 41. Returned with the answer or explanation of the Chemical national bank upon it?

A. Yes, sir.

Q. 42. The explanation you have given with reference to the March reconcilement applies, also, to this May one, I presume?

A. Yes, sir; equally as well.

Letter referred to offered in evidence by counsel for plaintiff hereto attached, and marked "Letter as to differences in May reconcilement. E. V. R., special examiner."

Q. 43. Have you the reconcilement sheet for the account current for the month of June, 1887, Mr. Causlen, together with any explanatory letters that may have passed from one bank to the other, with reference to it?

A. Yes, sir; I have it here, together with a statement and some papers for the month of June, made up by the Fidelity national bank.

162 Q. 44. This (indicating), is the reconcilement sheet for the month of June, is it?

A. Yes, sir.

Reconcilement sheet offered in evidence by counsel for plaintiff, hereto attached, and marked "Reconcilement sheet, for June, E. V. R., special examiner."

Q. 45. What is the paper I now hand you, Mr. McCauslen?

A. This has apparently been an attempt to reconcile the account. I don't think it has any bearing upon the matter whatever.

Paper offered in evidence by counsel for plaintiff, hereto attached, and marked "Attempt at reconcilement of June account, E. V. R., special examiner."

Q. 46. What is the paper I now hand you, headed "David Armstrong, receiver of the Fidelity national bank," dated Cincinnati, July 12, '87, Chem. N. Y.?

A. This seems to be a letter to the Chemical national bank by the Fidelity national bank.

Q. 47. By David Armstrong, as receiver, is it not?

A. Yes, sir; so it would be. A letter written by the receiver, setting out differences in the account for the month of June, 1887, as rendered by the Chemical national bank to the receiver of the Fidelity national bank.

Letter offered in evidence by counsel for plaintiff, hereto attached and marked "Armstrong letter to Chemical, July 12th, 1887. E. V. R., special examiner."

Q. 48. Mr. McCauslen, it would appear from the correspondence with reference to the April, May and June accounts, that the reconcilement sheet itself was not sent to the Chemical national bank by the Fidelity national bank, but that an abstract or summary of its statements in so far as they desired information, was sent on. Do you know whether that was the fact—in the course of the business?

A. It would seem from the correspondence now in existence that it was, yes.

Q. 49. I understand you to say, Mr. McCauslen, that you have not been able to find any such letter of explanation with reference to the March account, although you have made diligent search?

A. Yes, sir.

Q. 50. Look at the document I now hand you, Mr. McCauslen, and state whether that is also produced by you from the files of the Fidelity national bank?

A. Yes, sir; it is.

163 Paper offered in evidence by counsel for plaintiff, hereto attached and marked "Letter from W. J. Quinlan, cashier, to Ammi Baldwin, May 11, 1887. E. V. R., sp. ex."

Q. 51. Look at the document I now hand you, and state the same in regard to it, please.

A. Yes, sir; this also I took from the files of the Fidelity national

bank; it is a letter from W. J. Quinlan, Jr., to Ammi Baldwin, cashier, dated May 18, 1887.

Letter offered in evidence by counsel for plaintiff, hereto attached and marked "Letter from Quinlan to Baldwin, May 18, 1887. E. V. R., special examiner."

Q. 52. Look, also, at the document I now hand you, and state what it is?

A. This is also a letter; it is from the Chemical national bank, to Edward Armstrong, receiver of the Fidelity national bank, dated July 6, 1887.

Letter offered in evidence by counsel for plaintiff, hereto attached and marked "Letter from Quinlan to Armstrong, July 6, 1887. E. V. R., special examiner."

Q. 53. Mr. McCauslen, will you look at the reconcilement sheets for April, May and June, and state in whose handwriting they are?

A. Yes, these are all in the handwriting of—the reconcilement sheets proper—of Mr. Hicks.

Q. 54. When you say "the reconcilement sheets proper," you mean the statements on the first page, and not the detailed list of drafts outstanding, on the inner pages?

A. Yes, sir.

Q. 55. Now, the list of drafts outstanding, in this April account, is in whose handwriting, if you know?

A. I do not know.

Q. 56. In the May reconcilement sheet, as to outstanding drafts, if you know?

A. I do not know.

Q. 57. In the March reconcilement sheet, as to drafts outstanding, if you know?

A. I think it is in the handwriting of Mr. Hicks; yes, it is all in his handwriting.

Q. 58. In the June account, part of it is in figures, and part of it is in lead pencil; the names written in in lead pencil—lo you know as to the handwriting there (indicating on paper)?

A. The lead pencil writing is by McColling, a clerk in the Fidelity. I am not positive about the figures that are in ink; I am not certain about that.

Q. 59. Now, Mr. McCauslen, the letter of explanation
164 dated 5-12, 1887, is in whose handwriting?

A. Mr. Hicks'.

Q. 60. That is, in so far as it came from the Fidelity national bank, of course?

A. Yes, sir.

Q. 61. The explanation of the account for May—the May reconcilement—in whose handwriting is it, so far as it comes from the Fidelity national bank?

A. Mr. Hicks'.

Q. 62. The explanation dated July 12, 1887, in whose handwriting is it?

A. That also was written by Mr. Hicks.

Cross-examination by Mr. HERRON:

Q. 1. What position did Mr. Hicks occupy in the Fidelity national bank.

A. He was an assistant to the general book-keeper, at work upon the general books of the Fidelity—bank accounts.

Q. 2. Who was the general book-keeper?

A. Well, Mr. Watters, I believe, was.

Q. 3. And Mr. Hicks was his assistant?

A. Yes, sir.

Q. 4. He simply had charge of the accounts with banks?

A. Yes, he seemed to have charge of this account kept with the Chemical national bank.

Q. 5. And other banks, too?

A. Yes, sir; other banks as well. No, I will not say that he had charge of that particular bank any more than any of the other banks. It is a fact, that he has made the entries. The account was kept this way, in detail, and Mr. Hicks made the entries for some of the months.

Q. 6. He assisted generally?

A. Yes, sir.

Q. 7. And in the accounts with the different banks that the Fidelity kept accounts with?

A. Yes, sir.

Q. 8. Was the April one in Mr. Hicks' handwriting?

A. Yes, that is written by Hicks.

Mr. HERRON: I should like to look over these papers a little before any further cross-examination of this witness. Oh, one other question, I can ask him now.

Q. 9. Mr. McCauslen, what reason have you for supposing that the reconcilement sheets themselves were not sent to the Chemical national bank and returned to the Fidelity?

165 A. As I remember, it was not the custom of the Fidelity national bank to send the reconcilement sheets to its correspondents.

Q. 10. You think that that was not the custom?

A. I think that was not the custom.

Q. 11. Have you found anything in the correspondence that would indicate that they were not sent?

A. No, sir; I have not.

Q. 12. Have you any knowledge as to what the fact was, in connection with the transactions between the Chemical national bank and the Fidelity national bank?

A. No, sir; I have no actual knowledge (not having been employed in the bank), further than this correspondence shows here, that we have gone over.

Q. 13. Then, your only information is from the correspondence which you have produced here?

A. Yes, sir.

The further cross-examination of this witness in continued until counsel for defendant shall have had an opportunity of examining the exhibits offered in evidence by counsel for plaintiff.

And also M. M. WHITE, called on behalf of plaintiff, having first duly affirmed, testifies as follows:

Direct examination by Judge WORTHINGTON:

Q. 1. Mr. White, you are the president of the Fourth national bank of this city?

A. Yes.

Q. 2. How long have you held that position?

A. I think fifteen years.

Q. 3. Were you engaged in the banking business prior to that time, Mr. White?

A. As cashier I was.

Q. 4. In the same bank?

A. Yes.

Q. 5. How long, altogether, have you been in that bank, Mr. White?

A. Twenty-one or twenty-two years. I don't recollect which.

Q. 6. Mr. White, can you tell us whether or not, prior to the decision of the Supreme Court of the United States, in the case of The Western National Bank *vs.* Armstrong, receiver of the Fidelity national bank, in the spring of '94, it was considered an unusual or a usual thing for one bank to borrow money from another?

166 Question objected to by counsel for defendant.

A. It was a usual occurrence for them to do so; being regarded as legitimate in the line of banking business.

Q. 7. Tell us what officers of a bank, of a borrowing bank, were treated as having authority to make loans upon its behalf?

Question objected to by counsel for defendant.

A. I can only speak of the Fourth national bank—as to what was our custom. The application is usually made by the president or the cashier, either to borrow money upon rediscounting bills receivable, or, in some instances, to make their paper, pledging bills receivable as collateral—simply the paper made by the officers of the bank—the president or the cashier—which generally was replied to in a satisfactory manner, as, that such paper would be accepted and placed to the credit of the correspondent.

Q. 8. Do you know whether or not, Mr. White, prior to that time, is was usual or customary for the lending bank to demand a resolution of the board of directors of the borrowing bank, as showing the authority of the officer acting in its behalf, in that particular transaction?

A. Not to my knowledge was such a thing ever required, that the board of directors should, by resolution, authorize loans of this kind, prior to this decision of which you speak.

Q. 9. You have spoken with reference to the practice in your own

bank, Mr. White; do you or not, know what was generally considered the scope of the duties of the president and the cashier of other banks, generally?

Question objected to by counsel for defendant.

A. Well, upon the theory that banks in the West (with which we have more communication than with banks situated in the South, the extreme East, or the North), the business was usually managed by the officers of the bank who were given what I might call silent authority ("silent" is not exactly the word I would like to use—but—) to go on and transact the business; many of them being partnership banks, and a few of them being incorporated banks; and quite a number of them national banks——

Q. 10. Well, as to the scope of the authority of cashiers in national banks, in Cincinnati, prior to the year 1894, Mr. White, are you able to state what was considered within and without the scope of their authority?

A. Many years ago, when I was cashier of the bank, it became necessary, according to the opinion of the president of the bank (at that time, Theodore Cook, deceased), that the Fourth national bank should borrow some money; the application was made, and
167 the loan was made; the note was signed by Theodore Cook, president, without any authority of the board of directors. Without turning over the records of the bank, I am inclined to think that thereupon a record was made in the proceedings of the directors' meeting; simply reported, I think, that the records would show, that the transaction was reported to the meeting of directors. I am not sure about that part, but can easily ascertain——

Q. 11. No, Mr. White; my question is not as to particular instances; but whether you, from your knowledge of the banking business, can say whether the cashier of a national bank in Cincinnati was treated by the other banks and persons having to do with him, as having authority to borrow money on behalf of this bank; or whether he was not so treated?

A. In reply to that, so far as my knowledge goes, the question never was raised that his signature conveyed the liability of the bank, as much as it could upon any other signature that he might give in ordinary transactions.

Q. 12. Now, as to the president or the vice-president of the bank? Substitute either of these officers, in place of the cashier, as to whether that did, or did not, fall within the ordinary scope of their duties to borrow money on behalf of their banks?

A. I should say it did, as to the president and the cashier. Vice-presidents are not usually active in the management of the bank.

Q. 13. Suppose a case where the president was the inactive man, and that the actual management of the bank was with the vice-president?

A. Then, of course, he would become recognized as the active officer.

Q. 14. Mr. White, has there been any change in the custom of

banks since the decision of the Supreme Court of the United States in the case to which I have referred in the spring of 1894?

A. Yes; there has.

Q. 15. What is that change?

A. Since that decision many banks have required a resolution of the board of directors, authorizing the rediscounting of paper, or the borrowing of money upon what we call "made paper;" though it is now and then not insisted upon.

Q. 16. What do you mean by "made paper," Mr. White?

A. Such paper as I could make myself, in my official capacity; fill up a note at thirty days, or sixty days, or call loan, and
168 sign my name, officially, to it; just as a man would make up his own note and take it to the bank for discount; it does not represent anything except his own obligation. Bills payable, it would be called.

Q. 17. Mr. White, prior to the time of this decision, was any such resolution of the board of directors ever required or called for, in your knowledge?

A. I have never heard anything of that kind. I know that we never thought of such a thing.

Cross-examination by Mr. HERRON:

Q. 1. Is it an ordinary thing in Cincinnati for a banker to borrow three or five hundred thousand ($300,000.00 or $500,000.00) dollars for his bank?

Question objected to by counsel for plaintiff.

A. I should consider it to be an extraordinary thing.

Q. 2. Have you ever known of such a transaction in Cincinnati without consulting the board of directors of the bank?

Question objected to by counsel for plaintiff.

A. No, sir; I never knew of such a transaction either with or without consulting, or getting the consent of the directors.

Q. 3. What kind of loans do you refer to, Mr. White, as ordinary loans?

A. Well, where a bank is short in money, and long in bills, as frequently occurs, it is legitimate and proper to discount those bills and build up the cash of the bank. It is not an unusual thing for a bank to discount freely in anticipating the withdrawal of deposits. You can't pay checks with notes; and the only thing to do, when you are long on bills and short on cash, is to discount these bills—lessen your bills receivable, and thereby increase your cash—which I refer to as legitimate banking. Now, it often happens——

Q. 4. How much was the sum that was borrowed, in the case of Mr. Cook, to which you have referred?

A. My impression is that it was seventy-five thousand ($75,000) dollars.

Q. 5. And you think that that was reported to the board of directors?

A. I think that the minutes of our meetings would show that it was. I am distinct on one point, and that is, that that seventy-five thousand dollars was never to be checked against; that it was to count as a part of the resources of the bank; which, of course, enabled the Fourth national bank to withdraw a like amount of money, and at the same time have the seventy-five thousand dollars to their credit.

169 This is rather gratuitous information, but I want to place the Fourth national bank right. That is, many years ago; over 15 years ago.

Q. 6. In your experience, Mr. White, would not large transactions of that kind be talked over with the board of directors, whether there was any minute made of the transaction or not?

Question objected to by counsel for plaintiff.

A. It should be; and an officer that would do otherwise, in my opinion, would be usurping to himself more responsibility than was conferred upon him when he was elected to his position by the board of directors.

Q. 7. Mr. White, I will ask you whether it has been an ordinary transaction, in your experience in banking, for a party to deposit to the credit of a Cincinnati bank, in another bank, money, with directions that the money should be placed by the Cincinnati bank here to his credit.

Question objected to by counsel for plaintiff.

Mr. WHITE: Read that question again.

Question is read to witness.

A. Such transactions are not unusual in the ordinary line of business. For instance, we shipped a large amount of bonds to a bank in Boston last week, where we had no account, with directions to deliver the bonds and deposit the money with our correspondent, and so advise us; which he did, and we placed that money to the credit of the party for whom we shipped the bonds, to their credit in the Fourth national bank. Is that answering the question?

Q. 8. Yes; now, in the same way, is it not customary for you to receive advice that some person has deposited money in a New York bank to your credit, and when you are advised of that fact you place that money to his credit in your bank?

Question objected to by counsel for plaintiff.

A. Yes.

Q. 9. That is a usual transaction in your experience of banking?

A. Yes.

Q. 10. It is a usual transaction?

A. Yes; it is not unusual—not an unusual transaction.

Redirect examination by Judge WORTHINGTON:

Q. 18. Mr. White, is it a usual transaction in your bank for you to give a person credit there upon his own statement, without evi-

dence of any kind, that he has deposited money to your credit in New York, or any place else?

A. We should not make such a credit as that.

Q. 19. You would wait until you had received advice from the bank where he said he had deposited the money?

170 A. Most certainly we would.

Q. 20. Mr. White, as to whether a loan ordinary, or extraordinary, as between banks, either in its circumstances or amount, is it affected at all by the fact that the lending bank is a correspondent and reserve agent of the borrowing bank?

A. It would be.

Q. 21. In other words, in such cases what would seem a large loan as between banks which were strangers to each other, would not be between correspondent banks?

A. It would depend upon the capital of the correspondent. Five thousand ($5,000.00) dollars we should consider, with some of our correspondents, quite as much as fifty thousand ($50,000.00) dollars in other instances—as we would in the discounting of paper. We might, for instance, consider one thousand ($1,000.00) dollars ample to loan you, for your purposes; while we might consider that five thousand ($5,000.00) dollars for our venerable friend, Mr. Herron here, was not more than legitimate for his purposes.

Q. 22. In other words, Mr. White, the lending bank judges by the circumstances in the case?

A. Yes.

Recross-examination by Mr. HERRON:

Q. 11. Suppose you, yourself, had ten thousand dollars in New York city ($10,000.00), which you had directed to be deposited with your correspondent to the credit of the Fourth National Bank of Cincinnati, the money being your own, would your book-keeper here, on your statement of that fact, place that money to your credit? Would that be a usual transaction, as president of the Fourth national bank, you stating to your book-keeper that the money so credited was your own, would it be an unusual thing for the book-keeper to credit that money here to you, and charge it to the New York house?

Question objected to by counsel for plaintiff.

A. The book-keeper would, in all probability, make the entry, as he is simply an employé, subject to the control of the officers and directors to debit or credit, as the case might require.

Q. 12. And if the president of the bank informed him that that money belonged to himself, he would make that entry accordingly?

A. He would do it if he so considered the transaction—as a probable and likely transaction; otherwise, he would jeopardize his position that he occupied, if he declined to carry out the demands of his superior officer.

Q. 13. In other words, if he had no reason to doubt your

171 statement that the deposit belonged to you, it would be his duty to credit that to your account?

A. It would, most assuredly so.

Q. 14. Would you consider it any part of the duty of the book-keeper to report such a transaction to the directors of the bank?

Question objected to by counsel for plaintiff.

A. Not unless he had good and valid reasons to do so.

Q. 15. Unless he had reason to suspect the truth of what you said?

A. Yes.

Re-redirect examination by Judge WORTHINGTON:

Q. 23. Mr. White, the case that Mr. Herron has quoted is one where you speak to your book-keeper yourself, and don't show him any evidence that you have made any deposit in New York city, or anywhere else; and the question that I am going to put to you is this: (Don't suppose for a moment that I think you capable of it—but), suppose, as a matter of fact, that you never had made such a deposit to the credit of the Fourth national bank, in this other place; and that in telling the book-keeper that you had done so, and in directing him to make the credit you were directing him to make, a false and untrue entry; and suppose that the true fact was that instead of making the deposit in the other bank, that you had borrowed the money for the account of the Fourth national bank, and deposited that loan in this foreign place—the bank in New York—and had left it there on deposit with that bank; and then that you reported to the book-keeper, and he made the entry to your credit. Now, suppose that when your correspondent in New York rendered you the monthly account of its dealings with you, that in that account it appeared that a loan had been made to the Fourth national bank of this sum, but that no deposit had been made to its credit by you; and that that came to the knowledge of the book-keeper; tell me whether you think, under those circumstances, that it would have been the duty of the book-keeper to report that transaction, after he had received that account?

A. It would have been his duty, in my opinion, to have first informed the president of the transaction, if the cashier had made such a transaction, or the vice-president, if the president had, or the president, if the cashier had. Beyond that, I think his duty would end.

Q. 24. Suppose that the evidence to the book-keeper, at the time of the transaction, was that both the vice-president and the cashier were in the same boat?

172 A. Had the book-keeper knowledge that they were in the same boat, it would have been proper for him to have informed the finance committee, which is composed of probably two or three members of the board of directors, who act for a certain period.

And also FRANKLIN ALTER, called on behalf of plaintiff, being first duly sworn, testifies as follows:

Direct examination by Judge WORTHINGTON:

Q. 1. Mr. Alter, were you ever connected, in any capacity, with the Fidelity National Bank of Cincinnati?

A. Yes, I was one of the board of directors, in the start.

Q. 2. For how long did you continue to be a member of the board of directors?

A. Well, from March, I think, 9 months.

Q. 3. Do you recollect when the bank started business?

A. Yes, sir; in March, I think.

Q. 4. March of what year?

A. March, 1886.

Q. 5. And you continued a member of the board of directors for nine months?

A. Yes, sir.

Q. 6. Mr. Alter, state, during that time, who had the practical control and management of the Fidelity national bank?

A. E. L. Harper.

Q. 7. Was that known to all of the board of directors?

A. Yes.

Q. 8. Was it with their consent and approval that Harper managed the bank?

A. Yes.

Q. 9. Were the directors advised of the transactions of the bank, in the way of loans and discounts, and cash items, and other things of that kind?

A. I don't think they ever were, in detail, unless they went outside and got their information from other sources.

Q. 10. They practically entrusted the whole management of the bank to Harper?

A. Yes.

Q. 11. What was E. L. Harper's position in the Fidelity?

A He was vice-president.

Q. 12. Do you know of any efforts made by the members
173 of the board of directors, within the board, at that time, to find out the condition of the bank?

A. Yes.

Q. 13. By whom?

A. Myself.

Q. 14. Did you succeed?

A. No, sir.

Q. 15. Why not?

A. I was refused access to the papers.

Q. 16. Refused by whom?

A. By Briggs Swift, on Harper's advice.

Q. 17. Do you know whether this was with the consent of the other members of the board of directors?

A. Well, I don't think they were advised of it.

Q. 18. Do you know, Mr. Alter, whether any of the members of

the board of directors were, in fact, representatives of E. L. Harper, holding their tender by reason of having his stock put in their names?

A. Well, I presume that the cashier was—I don't know that of my own knowledge; but I think there is no question about that; Mr. Gahr, for one, and Mr. Matthews for another.

Q. 19. How about Mr. Baldwin and Mr. Hopkins?

A. Well, they were certainly furnished the money, to represent any stock that they held, by Harper.

Cross-examination by Mr. HERRON:

Q. 1. Who was president of the Fidelity?

A. Briggs Swift.

Q. 2. And Mr. Harper was vice-president?

A. Yes, sir.

Q. 3. And, Mr. Alter, how many directors were there?

A. Five, I believe.

Q. 4. Oh, more than that?

Judge WORTHINGTON: Take the minute book, Mr. Alter, to refresh your memory. I show you here, the first list of directors, as recorded in the minute book, on page 7. See if that will refresh your memory as to the number of the board of directors?

A. (After reading list.) Yes, I don't think Mr. Fleischman served. There are five here, that I remember; there are nine here in all, but these men were taken in after I went out.

Mr. HERRON:

Q. 5. There were nine directors?

A. Yes, according to this list; but they were not active members when I was in the board.

Q. 6. Who were the first directors?

174 A. Well, if this is the first meeting, they were: Henry B. Morehead, Solomon P. Kineon, Edward L. Harper, Briggs Swift, Wm. H. Chatfield, Franklin Alter, Charles Fleischman, James H Matthews, Albert P. Gahr.

Q. 7. Will you refer to the meeting in January, 1887?

A. Yes, sir.

Q. 8. Who was elected in January, 1887?

A. Briggs Swift, E. L. Harper, W. H. Chatfield, Henry Pogue, A. P. Gahr, Sol. P. Kineon, J. H. Matthews, Ammi Baldwin, Benj. E. Hopkins.

Q. 9. You say that you did not report to the board of directors that fact, Mr. Alter—that you were refused access to the papers?

A. No, sir; I had a reason for not doing it.

Q. 10. Well, you didn't do it?

A. No, sir.

Q. 11. What papers were they, Mr. Alter, that you were refused access to?

A. It was the call-loan account.

Q. 12. Have you any personal knowledge in regard to the stock owned by Baldwin and Hopkins?

A. No, sir; I never knew the amount they held.
Q. 13. Or Mr. Gahr, or Mr. Matthews?
A. No, I never knew the amount they held, either.
Q. 14. Have you been a director in other banks, Mr. Alter?
A. Yes.
Q. 15. Have you ever examined in those banks the condition of their accounts with other banks?

Question objected to by counsel for plaintiff.

(Continuation of question)—or detail of their accounts with other banks—banks with whom they had correspondence?
A. Well, I don't think that I ever did, unless as an examiner on committees.
Q. 16. You don't know whether you did as examiner, examine the details of the accounts?
A. No.

Redirect examination by Judge WORTHINGTON:

Q. 20. Mr. Alter, in answer to one of Mr. Herron's questions, you started to say something about having a reason for not reporting to the board of directors the fact that you were not allowed access to the call-loan account?
A. Well, yes; I was in the minority. My opposition to the methods that were adopted and carried out in that bank resulted in a committee being appointed to investigate the character of
175 Harper, Baldwin and Hopkins, with a view to deciding whether they were the proper parties to run that bank; and I had fair prospects, in the start, of having that committee report; I was on the committee. But when the meeting of the board was held, they decided not to hear our report; and forever after that I thought that the other directors might get their information wherever they saw proper. That was within thirty days after the start of the bank, and I never had any actual business with the bank after that.
Q. 21. Within thirty days after the organization of the bank, you were on a committee to investigate as to whether Harper, Hopkins, and Baldwin were proper persons to run the bank?
A. Yes.
Q. 22. And when the board of directors knew that you were ready to report, they refused to receive your report?
A. Yes, sir.
Q. 24. Had the purport of the report got out, so that the board of directors knew it?
A. Yes, and Mr. Swift was fully advised.
Q. 25. Do you recollect who it was that voted not to receive that report?
A. Well, there was no vote came up on the question. I was a witness before about this matter, and I will simply quote my evidence in that case. When I notified the meeting that I was ready to report, the president, Mr. Swift, spoke up and said, "We

don't propose to have anything to do with this matter. We are satisfied that the whole thing is nothing but Hearn's damn lies."

Q. 26. The matter investigated having been conduct of Harper, Baldwin and Hopkins, while in the Third national bank, before they came to the Fidelity national bank?

A. Yes, sir.

Q. 27. Mr. Hearne was president of the 3rd national bank?

A. Yes sir.

Recross-examination by Mr. HERRON:

Q. 17. As I understand, Mr. Swift thought that this whole story came from Mr. Hearn, the president of the 3rd national bank, where those three—Harper, Baldwin and Hopkins—had formerly been employed, and that it was not true, and that they would have nothing to do with it?

A. Yes, sir.

Q. 18. They all had been connected with the Third na-
176 tional bank prior to their connection with the Fidelity national bank?

A. Yes, sir.

Q. 19. Baldwin, as cashier; Hopkins, as teller, and Harper as a director?

A. Yes, sir.

Re-redirect examination by Judge WORTHINGTON:

Q. 27. And it was after this state of affairs that Harper was left with the full management of the Fidelity national bank?

A. Yes, sir.

Re-recross-examination by Mr. HERRON:

Q. 20–20. That is, Mr. Alter, there was no change made after that time?

A. No, sir; I think not.

At this point the taking of further testimony was adjourned until half past two o'clock, same afternoon.

Half past two o'clock, same day. Met pursuant to adjournment, same place; same parties present.

And also, CHARLES ARTHUR HINSCH, called on behalf of plaintiff, being first duly sworn, testifies as follows:

Direct examination by Judge WORTHINGTON:

Q. 1. Mr. Hinsch, were you connected in any way with the late Fidelity national bank of this city?

A. Yes, sir; I was.

Q. 2. In what position?

A. Assistant receiving teller.

Q. 3. During what time?

A. From about a week after the beginning of the bank to the close.

Q. 4. What officer of the bank, if any, had the actual control and management of the bank?

A. Edward L. Harper.

Q. 5. What was his position in the bank?

A. He was vice-president.

Q. 6. Did he dictate as to all the operations of the bank?

A. Yes, sir.

177 Q. 7. Do you know whether or not the other directors of the bank knew that he was running the bank according to his own ideas?

A. I don't know—that is—I suppose you mean the directors, at the close of the bank?

A. Not merely at the close of the bank, but during—say along from December, 1886, to May, 1887—along during that period; in the early part of the last six months.

A. I don't know, sir.

Q. 8. Mr. Hinsch, who was it, if any one, that said as to what items should be held over as cash items, if you know?

A. Edward L. Harper.

Q. 9. Who was it, if any one, that said as to what loans should be made, and what discounts?

A. Well, I don't know that I know that. That would not come under my supervision at all.

Q. 10. Cash, and cash items, are all that came under your jurisdiction?

A. Yes, sir.

Cross-examination by Mr. HERRON:

Q. 1. There was a president of the Fidelity national bank, I believe, Mr. Hinsch?

A. Yes, sir.

Q. 2. Cashier, an assistant cashier?

A. Yes, sir.

Q. 3. And nine directors?

A. Yes, sir; I don't remember the number of directors, but guess that was it.

Q. 4. You knew at that time who the directors were?

A. Yes, sir.

Q. 5. You saw them sometimes about the bank?

A. Occasionally.

Q. 6. Do you know whether there were directors' meetings held, or not?

A. No, sir.

Redirect examination by Judge WORTHINGTON:

Q. 11. Mr. Hinsch, you say that you saw the directors occasionally, there in the bank, what do you mean by that?

A. Why, they would walk in occasionally.

Q. 12. Did they pay any attention to the business of the bank?
A. I could not say. They would be either transacting some business in the bank—or appeared to be transacting business——
Q. 13. Business of their own, you mean?
A. Yes, sir; business of their own.

178 Recross-examination by Mr. HERRON:

Q. 7. Did you not see them go into the directors' room—there was a directors' room there?
A. Yes, sir.
Q. 8. Well, did you see them go into that room? You did, sometimes, I suppose?
A. Well, I hadn't any direct knowledge of that, no, sir; because the directors' room was so far from our desk that we didn't busy ourselves about that.

And also, SOLOMON P. KINEON, called on behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination by Judge WORTHINGTON:

Q. 1. Mr. Kineon, were you ever connected with the Fidelity national bank of this city?
A. Yes.
Q. 2. In what way?
A. I was elected a director of that bank.
Q. 3. During what time were you a director?
A. From the time it commenced until two or three months before it closed.
Q. 4. It failed, as appears, in June, 1887; how long before that had you ceased to be a director?
A. I couldn't say exactly. I think about six or eight weeks before that. The last meeting there, I think, shows when I quit—in the minute book there.
Q. 5. I call your attention to the minutes of the meeting on May 10, 1887, page 43, of the minute book; see if that will refresh your memory?

(Handing minute book to witness.)

A. Yes; that (referring to pages 43 and 44 of minute book) refreshes my memory. That is when I quit; when this resolution was offered.
Q. 6. Up to the time you quit, Mr. Kineon, who was the active officer managing the bank?
A. Mr. Harper—E. L. Harper.
Q. 7. What was his official position?
A. He was vice-president.
Q. 8. What did he do with reference to the bank?
A. He did everything; he ran the whole bank.
Q. 9. Did the directors know that he was running the whole bank?

A. Well, I guess that they were aware that he had charge. I don't know why they didn't.

179 Q. 10. Mr. Kineon, look over the minutes of the board of directors, and state whether that records correctly, according to your recollection of the proceedings of the meetings of the board during the time that you were there.

A. All of them?

Q. 11. Well, there aren't very many.

A. Well, this, here on page 44, is not exactly the way it was done. It says, "Mr. Kineon here gave his resignation," well, I didn't. None was necessary. When Harper bought my stock, that was all that was necessary; that is the meeting of May 10th.

Q. 12. Mr. Kineon, I will call your attention to the fact that, according to the minutes, on February 25, 1886, there was a meeting of the board for organization; and that J. H. Mathews resigned as a director, and Henry Pogue was elected to take his place, and that the cashier and the assistant cashier were elected; and that the next meeting was held on May, 6, 1886, and that sundry business was done. Was there any meeting of the board of directors between that period?

A. I don't remember.

Q. 13. I see that the next meeting appears to have been held on August 2nd, 1886. Do you recollect whether there was any meeting of the board during that interval?

A. No, sir; I have no recollection of it.

Q. 14. And the next meeting was on August 10, 1886, at which there was no quorum. The next meeting was on Sep. 14, 1886, at which there was no quorum; the next was on October 12, at which there was no quorum; the next was on October 9, 1886, at which there was no quorum. The next meeting was on December 14, 1886, at which there was no quorum, and then the next meeting was held on December 24th, 1886. Now, do you recollect of their being any meetings in that interval at which there was no quorum?

A. No, sir; I do not.

Q. 15. Did the directors of the Fidelity national bank require of Harper that he make any report to them of the affairs of the bank other than appears on these minutes?

A. No, sir; not to my knowledge.

Q. 16. Did the directors of the bank have recognizance of what was being done in the bank, so far as you know?

Question objected to by counsel for defendant.

A. No, sir; I don't know whether they did or not. I could not say. I can only speak for myself. Several things went on there that I called Mr. Swift's attention to; and that was about

180 Harper's large account that he had to his credit, with the Riverside Iron and Steel Company, and the Swift's iron & steel works——

Q. 17. When did you call Mr. Swift's attention to those things?

A. About two months and a half after the bank was opened.

Q. 18. How often did you call Mr. Swift's attention to those things?

A. Well, I think it must have been at least half a dozen times. Then he took me into the back room and showed me the large amounts that he had to his credit, and asked me what I thought of that. I never said anything to anybody, only to Mr. Swift.

Q. 19. Was anything said in any meeting of the board at which you were present, on that subject?

A. Not a word.

Q. 20. Upon any subject relating to Harper's management of the bank?

A. Not until I spoke of it in this meeting of May 10th. I frequently spoke to Mr. Swift, and then to Harper; and it seemed to make him mad; and Swift said that Harper said that if he would do as Kineon said, he would have all the money in the bank, and not a loan made. Swift came to me and said, "Harper says you would not have any loans out at all, if you were running the bank." I made the remark that I thought it might be convenient to have the money in the bank some day.

Q. 21. When was that, Mr. Kineon?

A. It was about the time that that peanut and vinegar man failed down here. The books will show that. I don't remember his name. I know I called their attention to it. And Harper made a bluff at it, and sent Hopkins down there, and he came back and reported that the place was full of peanuts; and I said if it was, it was not worth the money he had from the bank.

Q. 22. Did Harper ever report to the directors the loans he had made?

A. No, I never heard him.

Q. 23. Or as to the items that were being carried as cash, at the receiver's desk?

A. No, he never said anything about that.

Q. 24. The directors knew that Harper was loaning the money, I presume?

A. They must have; the book was there that people could see. He had the book there, of call loans and loans on his desk, whether he had them all on it or not, I could not tell; but he kept that out there on his desk.

Q. 25. Was it ever produced at directors' meetings?

181 A. No.

Q. 26. This motion that you speak of, Mr. Kineon, that you had made on May 10, 1887, had that been broached prior to that meeting, at any meeting of the board of directors?

A. No, I had talked with Mr. Swift frequently about it, and told him he ought to go over the loans. He kind of laughed at me. I told him it was his place to talk.

Q. 27. The motion seems to have been carried; and then your resignation was accepted. What occurred then—at that time?

A. Why, when I made the motion—do you want me to go into all the details of that meeting? It is a long story.

Q. 28. It's interesting. Go on.

A. Well, I made the motion. Harper objected, and Mr. Swift spoke up and said he didn't think there was anything wrong about that; and I told him that I insisted upon the motion being put and passed upon; and Harper then made the remark that he insisted upon my resigning. I told him that I was not elected by him, and that I didn't think it was necessary to make a motion of that kind; and that I was not going to resign in that way; at which he got very much put out and excited. I told him that I was astonished; that there was one way easier than that to put me out. I told him to just give me two hundred for my stock, and that "puts me out of the board," I said "when I sell my stock." I said, "Then you can elect anybody you please." He made the remark that he would give me a check, and I could bring the stock up in the morning. I said, No, I would not do it in that way; that my word was just as good as his. So he went out and got the money and laid it on the table; and I took up the money and started to go out, when he stopped me and asked me not to say anything about it; I said that I would not if he didn't; he said he would not. Then they elected Eugene Zimmerman to fill my place.

Cross-examination by Mr. HERRON:

Q. 1. Mr. Kineon, you were a director from the beginning of the bank, were you?

A. Yes.

Q. 2. How many meetings of the board of directors did you attend?

A. I could not tell you. I have no recollection now of that.

182 Q. 3. Did you attend regularly?

A. Yes, every time they called a meeting.

Q. 4. Their by-laws provided for monthly meetings?

A. I believe so.

Q. 5. Did you attend as often as once a month?

A. I went whenever they had meetings; I don't remember how often that was.

Q. 6. Were you on any committees?

A. No, I never was on any committee.

Q. 7. This book which you speak of, Mr. Kineon, was that a statement made out each day of the loans?

A. Yes, it was supposed to be.

Q. 8. And that was on the president's table all the time, you say?

A. On the vice president's table.

Q. 9. Open to the inspection of the directors?

A. Yes, that was the supposition.

Q. 10. Did you ever look at it?

A. Yes, a good many times.

Q. 11. And you went over the list?

A. Yes.

Q. 12. Is that the way you got your information as to the loans?

A. Yes.

Q. 13. And what was your objection about Harper's account? I didn't quite understand what you said about that.

A. I thought he had too much money to his credit.

Q. 14. Well, was there too much money loaned to him?

A. Well, this was what I was trying to find out.

Q. 15. But the amount to his credit on the books of the bank seemed to be large?

A. Yes; very large. And I asked Mr. Swift how it came about, and Mr. Swift made the remark that he had more money than he ever knew he had.

Q. 16. Was Mr. Harper, during all that time, engaged in other business?

A. I think he was in the pig-iron business, and was running the Swift's iron and steel works.

Q. 17. And he was doing a very large business in pig iron?

A. I think he was.

Q. 18. Was he running, at that time, the Riverside Iron and Steel Co.?

A. Yes.

Q. 19. That was a pretty large account, too?

A. Yes.

Q. 20. And did you know of any other business that he was engaged in during that time, except those three?

183 A. No.

Q. 21. He was the president of the Swift's iron and steel works?

A. Yes.

Q. 22. And he was the main man in the firm of E. L. Harper & Company?

A. Yes.

Q. 23. And he was president of the Riverside Iron & Steel Company?

A. Yes.

Redirect examination by Judge WORTHINGTON:

Q. 29. Your idea, Mr. Kineon, about these discounts—about this discount book—was that you did not know whether it truly represented the discounts?

A. No; I could not tell that. The first day I tried to find out anything I got bluffed by Mr. Swift and Mr. Harper both. They gave me the laugh.

Q. 30. You say, Mr. Kineon, that you attended every meeting of the directors which you were notified to attend?

A. Yes.

Q. 31. Have you any recollection as to how often you received notices to attend?

A. No; I haven't.

Q. 32. Were you out of the city during that period—from March, 1886, until May, 1887—when you resigned?

A. No; but I was sick one meeting—yes, I was sick during that time; and I know of one meeting that I did not attend. I was sick out at my home in Clifton, and I didn't come down; that was the

meeting where they tried to increase the capital stock. That is the only one that I can recollect now that I did not attend.

Recross-examination by Mr. HERRON:

Q. 24. Mr. Kineon, when was it, this time you were "bluffed," that you speak of?

A. It was about the time that I tell you of, when this peanut and vinegar man (Weller) failed.

Q. 25. How long before the bank failed was it?

A. I could not say that either. After that I didn't pay much attention to it.

Q. 26. It was some time before you sold your stock?

A. Not a great while, I think.

Q. 27. Did you ever say anything to any of the directors, at the meetings, about having the bills receivable and the loans examined, Mr. Kineon?

A. I spoke to Mr. Chatfield about it several times.

184 Q. 28. Did you ever bring the matter before the board of directors?

A. No, sir.

Q. 29. Did you ever suggest that there should be more meetings of the board of directors?

A. No; I did not.

And also, WILLIAM A. GOODMAN, called on behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination by Judge WORTHINGTON:

Q. 1. Mr. Goodman, you are president of the National LaFayette bank, of this city, are you not?

A. Yes, sir.

Q. 2. How long have you been connected with the banking business in this city, Mr. Goodman?

A. Twenty-odd years——

Mr. HERRON: Oh, more than that, Mr. Goodman; come now——

A. Well, thirty years. I don't want to go back too far. Well, I went into the bank in 1858, with Mr. Scarborough—into the original Ohio Valley bank.

Judge WORTHINGTON:

Q. 3. And have been in the banking business ever since, have you not?

A. Yes; I have been an officer ever since.

Q. 4. Were you cashier then?

A. Yes; I was cashier then.

Q. 5. And since that time?

A. I was vice-president of the National Bank of Commerce, and of its successor, the National La Fayette bank——

Q. 6. How long have you been president of the National La Fayette bank and its predecessor?

A. I organized the Bank of Commerce in 1876; in 1879 we bought the La Fayette bank; and I have been president ever since; ever since 1879.

Q. 7. Mr. Goodman, tell us whether or not, prior to the decision of the Supreme Court of the United States, in the spring of 1894, in the case of The Western National Bank *vs.* David Armstrong, receiver of the Fidelity national bank, it was an unusual or an extraordinary thing for a bank to borrow money?

A. To borrow money of a corresponding bank?

185 Q. 8. Yes; of a corresponding bank.

A. It was not a very unusual thing; it was rather unusual, but not an extraordinary thing. It was done, though, frequently. I never did it—or the bank with which I was connected.

Q. 9. Mr. Goodman, tell us whether one bank in lending to another bank prior to the decision of the supreme court in the spring of 1894, in the case to which I have referred, ever required the passage of a resolution by the board of directors of the borrowing bank, authorizing any of its officers to make the loan?

Question objected to by counsel for defendant.

A. I don't know.

Q. 10. Well, what I want to get at, Mr. Goodman, is as to the usage of the banking business. Do you not know how the banking business was carried on during that time?

A. Yes.

Q. 11. If it had been, or had not been, usual to require such a resolution, would it not have come to your knowledge?

A. Not necessarily; no, sir. I will make this statement in connection with that: We have applications from our correspondents to loan them money; but we always discount their paper. If they had required a loan on their own account, we should have required a resolution of the board of directors. We do not have many country correspondents. Frequently we discount their paper. In that case we have not required a resolution of the board of directors; but if we had had an application from a bank to borrow money on their own name, we certainly should have required a resolution of the board of directors.

Q. 12. Well, now, Mr. Goodman, are you reasoning now from the light of the past, or did the matter ever come up?

A. We have never had a case come up—I am merely stating what I naturally would have done any time since I have been in the banking business.

Cross-examination by Mr. HERRON:

Q. 1. Mr. Goodman, is it an unusual thing in the banking business for a customer of your bank to have money deposited to your credit in a foreign bank—in a foreign city—with instructions to have that sum placed to your credit in that bank, and for you then to credit him with the amount in your bank?

A. It is not a very common thing, but it has been done frequently?

Q. 2. Such a matter does often happen in banking busi-
186 ness? You know it does, don't you?

A. Yes, I suppose I do. You understand, Mr. Herron, we don't do a country business, and don't have much to do with loaning of money to country banks. We frequently have money transferred in that way.

And also, W. S. ROWE, called on behalf of the plaintiff, having duly affirmed, testifies as follows:

Direct examination by Judge WORTHINGTON:

Q. 1. Mr. Rowe, you are now the cashier of the First national bank of this city, are you not?

A. Yes.

Q. 2. How long have you been engaged in the banking business in this city?

A. Twenty-two years.

Q. 3. What positions have you held during that period?

A. About all the clerical positions.

Q. 4. How long have you been acting as cashier, of one bank or another?

A. Fourteen years.

Q. 5. How long have you been in the First national bank as cashier?

A. Nearly 6 years.

Q. 6. And prior to that, with what bank were you connected?

A. I was with the Second national bank; and with the old bank of Gilmore & Company; the Merchants' national bank and the La Fayette bank.

Q. 7. What position did you hold in the Second national bank?

A. I held most of the clerical positions there, and, finally, acting cashier, and subsequently, cashier.

Q. 8. When did you become acting cashier?

A. In 1881, and cashier in January—the January election in 1882.

Q. 9. Mr. Rowe, tell us whether or not, prior to the decision of the Supreme Court of the United States, in the case of The Western National Bank *vs.* Armstrong, receiver of the Fidelity national bank, in the spring of 1894, about a year ago, it was considered within the scope of the duties of the cashier of a bank to borrow money for his bank?

A. Yes, it was.

Q. 10. What, if anything, was required by the lending bank,
187 beyond the applicatien of the cashier, or one of his superior officers—the president or the vice-president of the bank?

A. Our rediscounting for country banks, for the loaning of the money, was usually done by correspondence, and the letter would be signed by either the president, vice president or cashier. If it was a rediscount, we took their acceptable business paper; with their endorsement; if it was a direct loan, we took the note of the bank, signed by one of the three officers I have named; with munic-

ipal bonds, or other good bonds as collateral, without anything else.

Q. 11. Was any resolution of the board of directors required?

A. No, sir.

Q. 12. Do you know whether that was usual in banking—in the banking business, prior to 1894?

A. It was not, so far as my knowledge goes?

Q. 13. Mr. Rowe, was the borrowing of money by one bank from another an extraordinary thing, in the banking business?

A. No. The country banks often did it—borrowed from us.

Cross-examination by Mr. HERRON:

Q. 1. Mr. Rowe, what proportion of these cases was the rediscounting of paper loaned by the bank?

A. It is pretty hard to tell; probably fifty (50 per cent.) to sixty (60 per cent.) per cent. of it.

Q. 2, And then nearly half of it was actually loaned?

A. Yes. Some of the country banks buy the securities of their own cities, or towns, or counties, and hold them to get money on, really, at certain seasons of the year when they need it, because those securities are better known. It is a class of securities that is better known in the city than the paper they get, especially in the farming communities.

Q. 3. Well, what proportion of the loan would be secured by such bonds or securities as collaterals?

A. All of the loans that we take, and have taken, from country banks, are always secured in one form or another.

Q. 4. By either bonds or securities?

A. By acceptable collateral.

Q. 5. How large would these loans be—in your experience, I mean?

A. Well, I remember one bank that we rediscounted—that we loaned one hundred and fifty thousand ($150,000.00) dollars to on bonds and securities. I remember another that we rediscounted from one hundred thousand ($100,000.00) to one hundred and fifty thousand ($150,000.00) dollars, just prior to the panic of 1893—that was in the First national bank. The Second national bank, when I was there, was like the La Fayette bank—local—not much country business.

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Q. 6. Your experience, then, has been in the First national bank—your experience of this kind?

A. The greater portion of it has been in the First national bank. I did some in the Second; made some loans there on bonds and securities; but it was very small in comparison with what I now do in the First.

Q. 7. Mr. Rowe, how far have you been in the habit of consulting the directors of your bank in making loans of this kind?

Question objected to by counsel for plaintiff.

A. Well, our loans at the First are made by the officers. We hold board meetings twice a week, that is, we have meeting days twice a

week. During the summer we may not have more than one a week. The loans that are made are read to the board then, and any applications that happen to come in on the day of the board meeting, in time, are acted upon at the meeting.

Q. 8. But the loans are always read off to the board at the meeting of the board succeeding the time the loans are made?

A. Yes.

Q. 9. And if the application is made on the day of the meeting, in time, it is acted upon by the board of directors?

A. Yes.

Q. 10. Now, do you remember whether any such applications for loans were read to the board before they were acted upon?

Question objected to by counsel for plaintiff.

A. Very frequently.

Q. 11. But you think that all of them were read to the board of directors, either before they were made, or at the first succeeding meeting after they were made?

A. Yes; that is our rule; probably nine-tenths ($\frac{9}{10}$) of our loans are made by the officers without consultation of the board.

Q. 12. Are you speaking of loans to banks or to individuals?

A. All loans.

Q. 13. Does the amount of the loan make any difference as to whether you should consult the board beforehand or not?

A. If we were satisfied with the security, the amount would
189 make no difference—up to our one-tenth limit, of course. We don't go beyond that.

Q. 14. But it would be a question about the security that is offered as collateral?

A. Yes.

Q. 15. Mr. Rowe, is it a usual, or an unusual thing, in a bank, in your experience, for one of your customers to have money deposited with your correspondent in some other city, and placed to his credit in your bank upon being advised of that deposit?

A. It is very usual with us. We often make those transfers.

Q. 16. If a sum of money is deposited with your correspondent in New York, and the president of your bank should inform the book-keeper that that money belonged to a certain customer, and to credit that amount to his account, would the book-keeper do it?

Question objected to by counsel for plaintiff.

A. Yes.

Q. 17. He would follow the direction of the president in that case?

Question objected to by counsel for plaintiff.

A. In our bank, all of those entries are made on written orders. I would instruct a clerk to the ticket from which the entry would be made; he would make the ticket and bring it to me, and I would put my initials on it. The book-keepers have no right to make an entry of that kind unless on the O K of the officers.

Q. 18. Suppose the cashier or the president made out such a ticket, and gave it to the book-keeper and told him to credit a certain customer with the amount and charge it to the correspondent bank; the book-keeper would, on the faith of that ticket, make the entry accordingly?

Question objected to by counsel for plaintiff.

A. Yes.

Q. 19. And that is a very customary mode of transferring accounts, is it not?

A. It is with us; yes.

Q. 20. Let me read to you the following ticket, Mr. Rowe:

"CINCINNATI, 1887.

The Fidelity national bank.

Credit Check.

Transfer of funds.....
E. L. H..... $300,000"

Is that the kind of a ticket that you refer to as being made by an officer of the bank?

190 A. Yes, that is the kind of a ticket. But that ticket raises another question——

Q. 21. Well, if on such a ticket as that being presented to the book-keeper, it would be his duty to make the entry transferring the funds, would it not—presented by the president of the bank?

Question objected to by counsel for plaintiff.

A. Yes; do I understand you that the ticket was O K'd by the vice-president, to whose credit the funds went, as an individual?

Q. 22. Yes; and that that is the form of the ticket which was presented by the vice-president of the bank to the book-keeper?

A. Yes; it would be the duty of the book-keeper to make the entry.

Redirect examination by Judge WORTHINGTON:

Q. 14. Mr. Rowe, you started to say that that ticket raised another question. What was the other question that occurred to you?

A. Why, the question of an officer of the bank crediting himself—using his position to put a credit to his own account.

Q. 15. That is not usual in the banking business, is it?

A. No.

Q. 16. And in the cases of which you have been speaking, about the transfer of funds, you have been speaking of an outside customer, of the bank, and you make the necessary ticket transferring the funds on your books?

A. Yes; either an individual or a bank. For instance: St. Louis transferred fifty thousand ($50,000.00) dollars to New York, for our credit yesterday; we gave them credit and charged New York.

Q. 17. You have not, then, been saying that it is usual and con-

sidered good banking for a bank officer, upon his own word, to direct a transfer of funds to his own credit?

A. No; but I did, and do, say, that even in that event, on that ticket, that if the order were given, the clerk would and should make the entry.

Recross-examination by Mr. HERRON:

Q. 23. Suppose it was a fact that the president of the bank had deposited in New York one hundred thousand dollars ($100,000) to the credit of your bank, of his own money, and directed the bookkeeper to transfer it to his account, making out such a ticket as I have read to you, would it now be proper for him to do it?

Question objected to by counsel for plaintiff.

A. Yes, if the money were deposited. Naturally, if I were
191 the clerk to make the entry, I would make it my business to see that the money was deposited, and if large sums went through in that way, I would speak to some of the other officers of the bank about it.

Judge WORTHINGTON:

Q. 18. That is to say, if you were the clerk, you would inspect the next account current which came from that bank, to see that that money was really deposited?

A. Yes.

Mr. HERRON:

Q. 24. Then, if you found that that sum had been deposited to them, in New York, that would satisfy your feeling on that subject, would it not?

Question objected to by counsel for plaintiff.

A. Well, I think we are rather going outside of the case. If my superior officer, that I had not confidence in, should direct me to make entries of that sort, and there were many large transactions of that sort, I should certainly feel it my duty to speak to some of the other officers about it.

Q. 25. But if you had full confidence in him, you would do as you were directed, and make no investigation of the matter?

A. Yes, and if he was a man of means, and I knew that the money was deposited in New York, I would make no further inquiry.

Re-redirect examination by Judge WORTHINGTON:

Q. 18. Mr. Rowe, suppose when the New York account current came for the month in which this deposit was supposed to have been made to the credit of your bank, that a credit appeared for the amount, but appeared with the words, "Tem. loan," before it, would that indicate that the money had been deposited by the officers of your bank out of his own moneys?

A. I think that if I were the clerk, it would cause me to look into the matter further.

Q. 19. You spoke to Mr. Herron here about "country banks" borrowing money, Mr. Rowe. What class of banks do you designate as country banks?

A. Banks in small places; the cities in the South, for instance; there are certain seasons of the year, during the moving of the crops—the cotton crops for instance—when they need money to move the crop, and the banks borrow moneys to let their customers have, to move the crops. And the banks up in Ohio, in the
192 agricultural districts, borrow money at certain seasons; up in the large wheat and corn countries; their customers will want money to buy cattle and stock with, and they frequently want more money than the country bank has, and we loan them the money on their municipal or other bonds, and carry the transaction until the crops or cattle are sold.

Q. 20. There are occasions, then, in legitimate banking, where a bank may need money to carry on its business?

A. Yes, in the country, especially. In the city we never borrow or rediscount our own paper, because our business is of a different kind.

Re-recross-examination by Mr. HERRON:

Q. 26. Well, this would arise from the country banks having discounted too much paper, would it not?

A. No, they frequently write us and say that some of their customers want money, which they will give them if we will make them a loan. You will readily see that in the agricultural country, they need more money at certain seasons of the year than at others; and a number of their customers will want more money than they can accommodate them with, unless they can secure a loan.

Q. 27. You have spoken about loaning money, Mr. Rowe, I will ask you about borrowing money. Is it customary for a bank cashier to borrow three or four hundred thousand dollars ($300,000 or $400,000) without consulting his board of directors?

Question objected to by counsel for plaintiff.

A. We never have borrowed money.

Q. 28. Would you regard it as good banking for an officer of a bank to do that, without consulting his directors?

Question objected to by counsel for plaintiff.

A. No, sir; I would not.

And also H. C. YERGASON, called on behalf of plaintiff, being first duly sworn, testifies as follows:

Direct examination by Judge WORTHINGTON:

Q. 1. Mr. Yergason, you are president of the Merchants' national bank of this city?

A. Yes.

Q. 2. How long have you been engaged in the banking business here, in this city?

193 A. Twenty-eight (28) or twenty-nine (29) years.

Q. 3. How long have you been president of the Merchants' national bank?

A. Three years.

Q. 4. Prior to that time did you hold a position in that bank?

A. Yes, I was vice-president for nine years, and cashier for 16 years or 17 years.

Q. 5. Mr. Yergason, state whether or not, prior to the decision of the Supreme Court of the United States, in the case of The Western National Bank *vs.* Armstrong, receiver of the Fidelity national bank in the spring of 1894, it was a usual or an unusual thing for cashiers of banks to borrow from other banks money for their own banks?

A. Well, you refer to the decision of the Supreme Court where it was decided that it was necessary to have a resolution of the board of directors approving the loan?

Q. 6. Yes.

A. Up to a year or a year and a half ago, we did not require any resolution of that kind. If a bank of good standing offered us good collateral, and wanted a moderate amount of money, we accommodated them.

Q. 7. Do you know whether such a resolution was ever demanded by the lending bank before that time?

A. No, sir; I have no recollection of it.

Q. 8. Was it considered within the usual scope of the duties of the cashier of a bank, or his superior officers, to borrow money for the bank, from another bank?

A. Well, we have occasionally made loans of that kind, yes.

Q. 9. What I want to get at, Mr. Yergason, is whether it was usual to make any further scrutiny of their authority than the fact that the officer was really what he purported to be—*i. e.*, president, vice-president or cashier?

A. No, sir.

Q. 10. Do I understand you, Mr. Yergason, that the fact of his holding the office was sufficient authority to make the loan?

A. Yes, sir.

Cross-examination by Mr. HERRON:

Q. 1. Mr. Yergason, what kind of loans do you refer to?

A. Loans by country banks.

Q. 2. In the way of rediscounting paper—bills receivable, of the bank?

A. Yes; sometimes.

Q. 3. In all cases you required good security?

194 A. Well, we have taken obligations of the bank for security.

Q. 4. Did you do that without any action of the board of directors?

A. No, sir; not our bank.

Q. 5. But you didn't know whether they had obtained the action of their board of directors or not?

A. No, sir.

Q. 6. Did you ever borrow any money?

A. Yes, yes; we have occasionally; I think we did in '73.

Q. 7. In such cases, Mr. Yergason, would you not consult your board of directors before doing so?

Question objected to by counsel for plaintiff.

A. Certainly.

Q. 8. You know of no case where money was borrowed by your bank without consulting the board of directors, and obtaining their approval for it?

Question objected to by counsel for plaintiff.

A. No, sir.

Q. 9. Mr. Yergason, is it a usual, or an ordinary thing in banking for funds deposited in New York to the credit of your bank, to be transferred to the credit of an individual here, on the books of your bank?

Question objected to by counsel for plaintiff.

A. It is, yes, sometimes.

Q. 10. What is the mode by which you would make such a transfer of funds?

A. Upon the advice of the corresponding bank in New York, that such a deposit had been made there to our credit——

Q. 11. You would make out a ticket here?

A. Yes; we would make out a ticket.

Q. 12. What kind of a ticket would that be?

Question objected to by counsel for plaintiff.

A. If we had notice that the money had been deposited in the correspondent bank, to our credit, to be transferred to an individual, we would make out a ticket——

Q. 13. And hand that ticket to your book-keeper?

A. Yes.

Q. 14. Who would attend to that transaction?

A. Any one of the officers.

Q. 15. No; I mean after the ticket was made out and handed to the book-keeper. If the cashier or the president of the bank made out such a ticket and handed it to the book-keeper, it would be his duty to make that entry, would it not?

Question objected to by counsel for plaintiff.

A. Yes, sir.

195 Q. 16. And that kind of a transaction is very common?

A. Yes, sir; it is.

Redirect examination by Judge WORTHINGTON:

Q. 11. Mr. Yergason, is it a very common thing for an officer of a bank, by such directions, given by himself, to have money transferred to his own credit, without having advice of any kind from the correspondent bank in which he was supposed to have deposited the funds?

A. No, sir; I think not.

Q. 12. The cases of which you have been speaking, is where customers of the bank come to you with evidence that they had made the deposit in the other bank?

A. Yes; either a certificate of deposit, or a letter of advice, that it is correct.

Q. 13. Having advice of that kind, you make the entry—you direct the entry to be made?

A. Yes, sir.

Recross-examination by Mr. HERRON:

—. Mr. Yergason, where the book-keeper follows the direction of the president or cashier of the bank, in that manner, then it becomes the deposit of the customers to whom it is transferred, and you honor his checks from that on against that deposit?

—. Yes, sir.

At this point the taking of further testimony was adjourned to half past two o'clock, Thursday afternoon, September 19th, 1895.

Thursday afternoon, half past two o'clock.—Met pursuant to adjournment.

Same parties present. Same place.

And also, GRIFFITH P. GRIFFITH, called on behalf of the plaintiff, being first duly sworn, testifies as follows:

Direct examination by Judge WORTHINGTON:

Q. 1. Mr. Griffith, you are the vice-president of the Citizens' national bank of this city, I believe?

A. I am; yes.

Q. 2. How long have you been connected with that bank?

A. Fifteen years.

Q. 3. In what position?

A. As vice-president and cashier.

196 Q. 4. You are vice-president, as well as cashier, and have been during this whole period?

A. Well, since 1887, I have been cashier as well as vice-president.

Q. 5. And prior to 1887, you were vice-president?

A. ——.

Q. 6. Mr. Griffith, before you went with the Citizens' national bank, were you connected with any other banks in this city? If so, in what capacity?

A. I was assistant cashier of the First national bank in 1863; from 1863 to January 1st, 1866. I was cashier of the Third National Bank of Cincinnati from January 1, 1866, to January 1st, 1877, and I was vice-president of the same bank—the Third national—from January 1, 1877, to October 1, 1880.

Q. 7. And it was on Oct. 1, 1880, that you joined the Citizens' national bank?

A. Yes, we opened it then.

Q. 8. Mr. Griffith, please state whether or not, prior to the decision of the Supreme Court of the United States in the spring of 1894, in the case of The Western National Bank *vs.* Armstrong, receiver of the Fidelity national bank, it was usual or an unusual thing for banks to borrow money?

A. It was a usual thing.

Q. 9. Mr. Griffith, please state whether or not, prior to that decision, it was a usual thing for the lending bank to require from the borrowing bank a resolution of the board of directors, authorizing the loan?

A. Never.

Q. 10. State whether or not the borrowing of money for a bank, from another bank, was one of the duties incident to the office of cashier, president or vice-president, or either of them?

A. Well, I don't think you put your question right——

Q. 11. Well, just answer the question according to your knowledge of the facts, please?

A. It is customary to make loans to correspondent banks when applied for either by the president, vice-president or cashier of said bank.

Q. 12. Was proof ever demanded as to the authority of either of the officers you have named, to make the loan?

A. Not to my knowledge or memory.

Cross-examination by Mr. HERRON:

Q. 1. How were these loans generally made?

A. They were made by correspondence almost entirely.
197 Sometimes they were made by personal visitation; and the proceeds always credited to the bank upon the books of the lending bank——

Q. 2. What I meant was this: Are those loans usually made by the rediscount of bills receivable of the borrowing bank, or the direct, independent loans to the bank?

A. If my memory serves me right, the institutions with which I have been connected have never made a loan, direct loan, to a bank, except when secured by securities such as country bonds, United States bonds, or other good and sufficient securities. As for lending money on the made notes of the president, vice-president or cashier, I never have done so, but I have rediscounted their bills receivable to great amounts, taking the endorsement of either one of the officers I have mentioned, as being sufficient.

Q. 3. Have any of the banks with which you have been connected, at any time, borrowed of other banks?

A. I could not remember. We have put up our Government bonds once in a while, and drawn against it, but we were not in the habit—the banks with which I have been connected never had to borrow money.

Q. 4. Mr. Griffith, in your opinion, is it part of the duty of either the cashier, the president or the vice-president to borrow money for his bank without consulting the board of directors of his bank?

Question objected to by counsel for plaintiff as immaterial and irrelevant.

A. Why, I consider it good banking, as well as the duty of an officer of a bank, or one of his official acts, to rediscount his bills receivable, if necessary, when his deposits are called for more rapidly than usual. I see nothing against it. It is his assets. He takes these in——

Q. 5. Well, that is not what we are talking about, Mr. Griffith. We are talking about borrowing money independently, without consulting the directors, and whether you have ever known such a case in your experience of banking?

Same objection by counsel for plaintiff.

A. You mean where a man has borrowed money without the knowledge——

Q. 6. Of the board of directors, or without consulting them?

A. I couldn't tell that. I never asked the question if a party came to me; I never asked the question as to whether the board of directors knew anything about it.

Q. 7. I suppose you do now?

A. Yes; we do now; but I should consider it my duty if
198 I had a run upon me, and had good bills receivable, it would be my duty to discount those bills; and if I couldn't see my directors, it wouldn't take me long to rediscount them without consulting them. We never have any trouble with fellows that do things in an honest, fair shape. It's only these fellows that bust up that you have trouble with.

Q. 8. Mr. Griffith, is it a usual, or an unusual thing, with bankers to transfer from one account to another, or from the bank's account to an individal account, money deposited with their correspondents in other cities?

Question objected to by counsel for plaintiff as immaterial and irrelevant.

A. Well, tell me what you mean by that?

Q. 9. Where a party deposits money in another city to the credit of your bank, but for the benefit of one of your depositors, to have that deposit transferred to his account in your bank—is that a usual or an unusual thing?

Question objected to by counsel for plaintiff.

A. Why, it is perfectly proper to have that done—that is, if I understand your question correctly. If Mr. Worthington deposits

some money in New York, to the credit of our bank, and requests me to credit to John W. Herron, that is perfectly correct, and is often done.

Q. 10. What is the form by which that transfer is made in the bank?

Question objected to by counsel for plaintiff.

A. In the first place, the correspondent of the city bank here telegraphs that so and-so has deposited so much to our credit, and then upon being notified to transfer the amount to the credit of so-and-so, we do it——

Q. 11. Well, how is that done? Do you make out a ticket?

A. Yes; I make out a ticket, and put my initials on it.

Q. 12. What is the form of the ticket—how does it read?

A. It is, "Credit A. so many dollars; charge the account of such and such a bank, by so and so much."

Q. 13. And that ticket is marked by either you or some other official of the bank?

A. Yes; it is never done otherwise.

Q. 14. And that ticket is given to the book-keeper and he makes the transfer on the books?

A. Yes.

Redirect examination by Judge WORTHINGTON:

199 Q. 13. Mr. Griffith, is it usual to make such transfers without advice from the foreign bank in which the deposit is supposed to have been made?

A. No, sir.

Q. 14. I mean is it usual in banking—for instance, for you, in the Citizens' national bank here, upon a customer coming and stating to you that he has deposited so much money to your credit in New York, for you thereupon, upon his words, to give him credit upon your books, here in Cincinnati?

A. No, sir.

Q. 15. That is something that is never done?

A. No, sir.

Q. 16. Mr. Griffith, you have spoken about loans made to banks, from one bank to another, by the borrowing bank either having their bills receivable rediscounted, or by putting up collaterals. When securities are put up as collateral, how is the loan evidenced? How is it usually done?

A. We let the man that comes down make his individual note, and describe the collaterals in it, and sign his name to the note.

Q. 17. The individual who applies for the loan on behalf of his bank, gives his own note to the order of his bank, describing therein the collateral security, and then endorsed the note in his official capacity—is that it?

A. Yes.

Recross-examination by Mr. HERRON:

Q. 15. Mr. Griffith, should you, as vice-president of the Citizens' national bank, present a ticket such as you have described, to your book-keeper, to transfer certain funds to a customer of the bank, and charge it to the bank, would it be the duty of the book-keeper to ascertain whether you had authority for making that entry, or not? Or, would he make it simply on your direction to do it?

Question objected to by counsel for plaintiff.

A. He would make it on my direction to do it. He would have no right to question my authority.

Reredirect examination by Judge WORTHINGTON:

Q. 17. Mr. Griffith, you understood that question as referring to a deposit to be made to the credit of some person else than yourself—some person in whom you were not interested?

A. Yes.

Re-recross-examination by Mr. HERRON.

Q. 16. Well, if you made out a certificate of deposit, or a
200 ticket such as you have described, directing it to be deposited to your own credit, would the book-keeper ask any questions as to your authority?

A. I don't think he would have any right to do so.

And also, J. D. HEARN, called on behalf of plaintiff, being first duly sworn, testifies as follows:

Direct examination by Judge WORTHINGTON:

Q. 1. Mr. Hearn, you are the president of the Third national bank of this city, are you not?

A. I am; yes, sir.

Q. 2. How long have you held that position?

A. Well, since January, 1882. Prior to that I was president of the Covington City national bank, for about ten years, in Covington, Kentucky; and of the Covington branch of the Farmers' Bank of Kentucky, for one year previous to that time.

Q. 3. Please tell us whether prior to the decision of the Supreme Court of the United States, in the spring of '94, in the case of the Western national bank, it was, or was not an ordinary thing for one bank to borrow money from another?

Question objected to by counsel for defendant.

A. It was.

Q. 4. State whether, prior to that decision, it was customary for the lending bank to require from the borrowing bank the passage of a resolution by its board of directors, authorizing the loan.

A. It was not.

Q. 5. Was the passage of such a resolution ever required by the lending bank, so far as your knowledge goes?

A. It never was, so far as my knowledge and experience goes.

Q. 6. Mr. Hearn, what officers acted for the borrowing bank in such transactions?

A. The managing officers; either the president, or the cashier, as the case might be.

Q. 7. How about the vice-president?

A. The vice-president would act if he was an active officer.

Q. 8. What proof, if any, did the lending bank require of the authority of either, or any, of these officers to make the loan, more than the knowledge of the fact that they held their respective positions?

A. Did not require any.

201 Q. 9. Mr. Hearn, did it, or not, fall within the scope of the duties of the cashier, president or vice-president, to borrow money on behalf of his bank from another bank?

Question objected to by counsel for defendant.

A. It did. It was so regarded.

Cross examination by Mr. HERRON:

Q. 1. I suppose that custom has changed since that decision, Mr. Hearn?

A. It has. It changed so far as the Third national bank is concerned; and I may say that it has changed in a number of other banks of which I have knowledge.

Q. 2. Were these loans made by rediscounting of the bills receivable of the borrowing bank, or by direct loans to the bank?

A. Either way, and both ways. When they were direct loans, they generally would put up their bills receivable, or some other collateral, as against it.

Q. 3. In such loans, then, it was customary either to rediscount bills receivable, or to get bills receivable, or other collaterals to secure the loan—as security for the loan?

A. It was. The custom is exactly the same now as it was then, excepting that now we require the action of the board of directors of the borrowing bank regarding it.

Q. 4. Have you had any experience at the other end of the line, Mr. Hearn—at the borrowing end?

A. Yes, we have.

Q. 5. Was it your custom in such cases to consult the directors before borrowing money?

Question objected to by counsel for plaintiff.

A. Do you mean now, or before that decision?

Q. 6. I mean before that time.

Same objection by counsel for plaintiff.

A. We generally consulted with the board of directors—in fact, we always did. We consulted with the board of directors when we borrowed money for the bank.

Q. —. You say that you always consulted with the board of directors before you borrowed for the bank?

Same objection by counsel for plaintiff.

A. Yes, always; and had their consent.

Q. 7. And I suppose that you supposed when you loaned money to a bank that the officers of that bank had consulted with their directors?

Same objection by counsel for plaintiff.

A. I don't know whether I want to say that or not. The amounts that are borrowed of us by our corresponding banks are usually not large; and we take it for granted that the officers have consulted with their boards of directors. We felt that the money for
202 the discount went to the credit of the bank, and was checked out in the due course of business. And in the money was borrowed without proper authority, the money being thus borrowed and placed to the credit of the borrowing bank, and checked out in the usual way, we would, in any case, have a right of action against the bank for money borrowed and received.

Q. 8. When you borrowed yourself, were the amounts large or small?

Question objected to by counsel for plaintiff.

A. Large.

Redirect examination by Judge WORTHINGTON:

Q. 10. Mr. Hearn, I understand that you did not communicate to the lending bank the fact that you had the approval of the board of directors of your bank?

A. No, sir; I don't think we ever did, because I don't think it was ever required, or ever asked of us.

MONDAY AFTERNOON, THREE O'CLOCK, *November* 11, 1895.

Met pursuant to adjournment, at the office of Judge Worthington, in the Wiggins block, Cincinnati, Ohio.

Present, on behalf of plaintiff, Hon. William Worthington; present, on behalf of defendant, Hon. John W. Herron.

ALBERT P. GAHR, called on behalf of the plaintiff, being first duly sworn, testifies as follows:

Direct examination by Judge WORTHINGTON:

Q. 1. Mr. Gahr, you are a resident of Cincinnati?

A Yes, sir.

Q. 2. And your age is what?

A. I am 31.

Q. 3. Are you the A. P. Gahr, who was a director of the Fidelity national bank, late of this city?

A. I am; yes, sir.

Q. 4. Mr. Gahr, what relation did you bear to Edward L. Harper, the vice-president of the Fidelity national bank?

A. Why, I was considered his confidential secretary.

Q. 5. To whom did the stock in the Fidelity national bank, that stood in your name, belong?

A. It belonged to E. L. Harper.

Q. 6. Mr. Gahr, do you know who was the owner of the
203 stock in that bank that stood in the name of J. H. Mathews, who was, also, a director in that bank?

Question objected to by counsel for defendant.

A. To E. L. Harper.

Q. 7. Mr. Gahr, what relation, if any, did Mr. Mathews bear to Mr. Harper?

A. Mr. Mathews was a brother-in-law of Mr. Harper, and he was employed as treasurer of one of his industrial concerns here.

Q. 8. Mr. Gahr, who was the controlling person in the affairs of the Fidelity national bank?

A. E. L. Harper.

Q. 9. What supervision, if any, did the board of directors of the Fidelity national bank give to the affairs of that bank?

A. Only a formal supervision, I believe, such as holding the meetings; but I couldn't tell now, after this long lapse of years, just what we did do, without reference to the minutes.

Q. 10. Did you attend the meetings of the board of directors regularly, Mr. Gahr?

A. Occasionally, yes. I could not say just what meetings I did, or did not, attend; but I made it a point to be present at the meetings when I could. I think I attended most of them.

Q. 11. Mr. Gahr, were the transactions of the bank, in the way of loans and discounts, and otherwise, submitted to the board of directors by Mr. Harper, or to a committee thereof, to your knowledge?

Question objected to by counsel for defendant.

A. Not so far as I know.

Cross-examination by Mr. HERRON:

Q. 1. Mr. Gahr, how long were you a director in the Fidelity national bank?

A. I think I was a director from the inception to the end of the bank.

Q. 2. Were you in that bank much, Mr. Gahr?

A. Almost daily.

Q. 3. You knew a good deal of what was going on, as a director, did you not?

A. Not as a director, no, sir, but what Mr. Harper would tell me, in a superficial way.

Q. 4. As a director, you made inquiries frequently as to what was going on?

A. No, sir, I never made any inquiries.

Q. 5. You only knew what Mr. Harper told you?

A. And in the board meetings—what I heard there.

204 Q. 6. Mr. Gahr, were you not on the committee of loans and discounts?

Question objected to by counsel for plaintiff.

A. I am not positive about that now; but I think not.

Q. 7. Mr. Gahr, what knowledge had you, as a director, that Mr. Harper had borrowed large sums of money from eastern banks, in the name of the bank?

A. None at all, as a director.

Q. 8. When did you first learn of such fact?

A. Why, my recollection is, that after I came home from Chicago, and this run was going on on the bank, that Mr. Harper told me of having made some rediscounts with eastern banks—or that he had made some loan, in some form, and that was my first knowledge of transactions of that character.

Q. 9. How long was that before the bank closed?

A. Possibly three or four days—or some such matter.

Q. 10. Do you know whether any of the other directors of the Fidelity national bank knew of such loans having been made?

A. No, sir; I don't know.

Q. 11. When Harper spoke to you about the matter, did he say, did he specify what discounts he had made?

A. I think he mentioned specially the Chemical National Bank of New York as one of the parties from whom he had borrowed some money, so as to help him through this crush that he was under at that time.

Q. 12. Did he say when he made the loan?

A. I think he mentioned the loan as having been made a day or two before.

Q. 13. It was, then, the last loan from the Chemical national bank that he had made?

A. Well, I could not say as to that. But I would fix the conversation with Mr. Harper as about the 16th or 17th of June, 1887.

Q. 14. And he stated that he had borrowed money from the Chemical national bank two or three days before that?

A. He did not say how long before, but I inferred, from what he did say, that it was only a day or two before; he said that he had borrowed this money to help him out in this run on the bank; rediscounted paper, I think, it was.

Judge WORTHINGTON: I now offer in evidence a stipulation, signed by counsel on both sides, under date of October 14th, 1894; relating to the case of David Armstrong, receiver of the
205 Fidelity national bank, *vs.* Briggs Swift *et al.*, in the United States circuit, southern district of Ohio, western division, No. 4054; marked "Exhibit A," "E. V. R., special examiner."

Also a printed copy of the bill of complaint in the case just referred to, marked "Exhibit B, E. V. R., special examiner."

Counsel for defendant objects to both of the above offers of testimony, not on the ground of the form in which it is offered, but on the ground of incompetency and irrelevancy.

Counsel for plaintiff offers, also, a certified copy of the application filed in said cause last named, on March 12th, 1890, by David Armstrong, receiver; the plaintiff in said cause, for instruction with ref-

erence to proposition to compromise the claim against the defendants, Briggs Swift, the executors of William H. Chatfield, Henry Pogue and Eugene Zimmerman, together with the exhibits thereto attached; marked "Exhibit C, E. V. R., special examiner."

Same objection interposed by counsel for defendant.

Also, certified copies of all the objections filed in said cause to the making of said compromise, viz: The protest of Catherine Brooks, marked "Exhibit D, E. V. R., special examiner." The protest of Oscar I. Frank, marked "Exhibit E, E. V. R., special examiner." The protest of Richard Mallay, marked "Exhibit F, E. V. R., special examiner."

To all of which counsel for defendant makes same objection as above indicated.

Also, certified copy of order made by said court, in said cause, on April 16, 1890, directing the making of the compromise with the defendants in said cause, above named. Marked "Exhibit G," E. V. R, special examiner.

Same objection interposed by counsel for defendant.

Also, a certified copy of order made by the court, in said cause, on May 19, 1890, rendering judgment against Briggs Swift, one of the defendants therein. Marked "Exhibit E, E. V. R., special examiner."

Same objection interposed by counsel for defendant.

Also, a certified copy of order made by said court, in said cause, on July 1, 1891, reviving said judgment against the executors of Briggs Swift, then deceased, and his heirs-at-law and devisees. Marked "Exhibit I, E. V. R., special examiner."

Same objection interposed by counsel for defendant.

Also, a certified copy of an order made by said court, in said cause, on the 4th day of January, 1895, entering satisfaction
206 upon the claim made in said cause against said defendant, William H. Chatfield, and his executors, he being then deceased. Marked "Exhibit J, E. V. R., special examiner."

Same objection interposed by counsel for defendant.

Also, from the printed evidence on behalf of the complainant, filed in said cause, pages 579 to 599 thereof, inclusive, being the examination of J. H. Watters, held upon Saturday, the nineteenth day of January, 1889. Marked "Exhibit K, E. V. R., special ex."

Counsel for defendants objects to the introduction of this printed testimony on the ground that the witness, J. H. Watters, is living in Cincinnati, and able to testify; and has already testified in this case.

SATURDAY, *January 19th*, 1889—two o'clock p. m.

Met pursuant to adjournment.

J. H. WATTERS recalled.

Direct examination by Mr. WILBY:

Q. Mr. Watters, are you able to state from any investigation you have made, and from such actual knowledge as you may have of the transactions themselves, besides the letters and records in the books

of the Fidelity national bank, how E. L. Harper obtained—if he did obtain—credit for $700,000; $400,000 of it at the First National Bank of New York City, and $300,000 with the Chemical National Bank of New York City? And what those transactions were, and what the entries were, if any, and what the proper entries should have been, for those transactions?

A. Yes, sir; I can answer the question fully, and herewith submit a statement which I have written out, being a statement of the facts connected with the transaction about which you have asked me.

(It is agreed between counsel that the written statement submitted by his witness, in his answer, may be taken as his testimony in answer to the question just propounded to him.)

(Counsel for plaintiff offers all the letters and certificates of deposit, and the entries recited in the answer of the witness—reduced to writing—and it is agreed that copies of the said papers may be used instead of the originals.)

Cross-examination by Mr. RAMSEY:

207 Q. What entries, if any, were made in the books of the Fidelity national bank, showing the transfer of these collaterals to the First National Bank of New York City and Chemical National Bank of New York City?

A. The collateral that was sent to the First National Bank of New York, in all amounted to $113,000, which was the property of the Fidelity national bank. Of this there was no record made. There was, also other collateral sent that was not the property of the Fidelity.

Q. Whose property was it?

A. That I cannot say.

Q. Is there any record on the books of the Fidelity national bank, of the collaterals sent to the First National Bank of New York, or the Chemical National Bank of New York?

A. No, sir.

Q. What entries were made of the three certificates of deposit, to which your statement refers?

A. The certificate marked No. 315, in the certificate book, in its regular order, is marked "canceled." For this there was a certificate issued, signed by Ammi Baldwin, of which I have made a copy and attached to my statement, which is marked "Watters Exhibit L," for $300,000. There is also a record on the back of the certificate book, out of the regular order, stubs of certificates Nos. 497, 499 and 500, with the explanation "Issued to E. L. Harper." The certificate No. 497, had been issued to him, but was never used. These certificates were entered on the same page, in the back part of the certificate book. This was the only record on the books of the Fidelity national bank there in the back of the certificate of deposit book, out of their regular order.

Q. Were you aware at the time of these transactions that there was anything wrong in them?

A. No, sir, I was not.

Q. At what time, if at all, prior to the suspension of the Fidelity bank, were your suspicions aroused as to the transactions of E. L. Harper?

(Question objected to by counsel for plaintiff as incompetent and irrelevant.)

A. I had a knowledge from time to time that there were large amounts carried in the cash items, but as to what those items were, I was never told, and never saw them. The first time I was aware that the bank was in such condition that Mr. Harper could not take care of it, was on the 20th of June, 1887, when the national bank examiner came. I had a talk with Mr. Harper, and asked him if he was able to take care of the cash items, he said that he had done all he could, and that things would now have to take their course.

208 (Objected to by counsel for plaintiff.)

Q. What had been your opinion and belief up to that time as to Mr. Harper's financial condition?

(Objected to by counsel for plaintiff as incompetent and irrelevant.)

A. I believed Mr. Harper to be quite a wealthy man, and able to take care of any obligation that he might have in the bank or outstanding.

By Mr. McDOUGALL:

Q. You were a clerk in the Fidelity bank from the beginning, were you?

A. Before the beginning.

Q. And continued with the bank until it closed?

A. Yes, sir.

Q. During your connection with that bank, what irregularities, if any, do you know of existing in the books of the bank?

(Same objection by plaintiff.)

A. I knew that there was certain items carried at the receiver's desk as cash, that were not cash.

Q. I am speaking of the books of the bank—what other irregularities were there, if any?

(Same objection by plaintiff.)

A. There were no irregularities entered on the books of the bank, except, as I have stated, in the back of the certificate of deposit book.

Q. Then, so far as you knew, the books of the bank were properly kept during the time that you were connected with it?

A. Yes, sir.

Q. And so far as you knew, there were no irregularities in the management, except as you have stated, in reference to the cash items?

A. No, sir.

(Same objection by plaintiff.)

Q. Now, what those cash items were don't appear on the books of the bank?

A. The items themselves do not appear on any book of the bank. The only record of it was on the slips of paper kept by the receiving teller.

Q. Then, the items which you say were irregular, were not items appearing on the books of the bank?

(Same objection by plaintiff.)

A. Only in the total amount, the itemized items themselves do not appear.

Q. But in the total amount on the books of the bank,
209 there was nothing to indicate that they were other than cash?

A. That they were cash items.

Q. What were they called in the books of the bank—cash, or cash items?

A. Cash items.

Q. There was nothing on the books of the bank to indicate what their character was?

A. No, sir. The only record of them was on these slips that I have mentioned, kept by the receiving teller.

Q. Merely papers kept by the receiving teller?

A. Yes, sir; the items themselves were kept in a tin box, and the slips kept was the only record that would tell what those cash items consisted of.

Q. But those were not books—merely pieces of paper?

A. That is all.

Q. And they were slips of paper kept by the receiving teller, or whoever carried them—simply for his own convenience, were they not?

A. And for matter of record in case they might have to be checked up from day to day.

Q. What became of those slips of paper?

A. They are with the receiver now.

Q. Any one examining the books of the bank, and knowing nothing about these slips of paper, would not have found on the books of the bank anything to show any irregularity, would they?

(Same objection by plaintiff.)

A. Are you asking as to a person that was fully versed with the banking business—or some one who would not know—

(Question withdrawn.)

Q. When did you first know that the certificates of deposit were in the certificate book recorded out of their regular order?

A. The first time I knew that was on the morning of the 20th of June, 1887, at about eleven o'clock.

Q. Were they in the book prior to that time?

A. I can't say. They were shown to me by Mr. Powell on that day.

Q. Then, so far as you know, there was nothing on even the certificate of deposit book prior to the 20th of June, to show that these certificates had been issued?

A. I had no personal knowledge of it.

Q. Who had charge of the certificate of deposit book?

A. Miss Josie Holmes.

Q. And you don't know when the entries referring to this $700,000 were made?

210 A. No, sir.

Q. They were probably made on the morning of the 20th of June?

(Counsel for plaintiff object to the question as incompetent and irrelevant, and as being speculation on the part of the counsel for defendants.)

A. I don't know.

Q. Had you anything to do with the issuing of any certificates of deposit?

A. No, sir; and I had never seen them——

Q. I mean with the issuing of any certificates of deposit?

A. I may have issued one or two in the first part of the bank's existence.

Q. Did you keep any record of their being issued?

A. There were other records on the books of the bank.

Q. In those other records of certificates of deposit, do these certificates for the $700,000 appear?

A. No, sir; they do not. The only record of them on the books of the Fidelity national bank is right here on the certificate of deposit book.

Redirect examination by Mr. WILBY:

Q. You have been asked, Mr. Watters, about the record kept of the collaterals sent to the New York banks—either to the First national or the Chemical National Bank of New York City; I will ask you whether or not there was a copy made of the letters enclosing those collaterals, at the time they were sent, in the letter press copy book, if you know?

A. I would have to examine the letter books to see.

Q. Will you do so?

A. Yes, sir.

Q. You don't know, then, whether the letters mentioned in your statement were copied, or not?

A. No, sir.

Q. You don't mean to be understood, then, in your answer to Mr. Ramsey, that no such record was made?

A. Did I say that?

Q. You said that no record was made——

A. On the books of the Fidelity—not on the letter books. I didn't mean the letter books, when I said books.

Q. Well, I mean the letter books, when I say books. Now, will you look upon the letter book and see if there is any record of these letters, press copy or otherwise?

A. Yes, sir; I will look.

Q. You have been asked about the cash items, and have
211 stated that there was a slip upon which those items were kept, giving the character and description of them every day, was there not, at the receiving teller's desk?

A. Yes, there was a slip kept at the receiving teller's desk, but the matter of making up the record was not done every day. That is, all these, other than regular cash items, would not be made up every day, unless there was some change in them; they were made up whenever a change was made.

Q. And the slips were kept with the items themselves in that tin box, of which you have spoken, at the receiver's desk?

A. Yes, sir.

Q. Was that tin box kept open?

A. Well, I can't say as that—I have seen it open.

Q. Any one seeing those cash, or the slips, would have realized what they were?

(Question objected to by counsel for defendants, as incompetent, irrelevant and leading.)

A. If any one had examined the cash items; if they would take the cash items out, and examine them, they would.

Q. You do not mean that the carrying of these cash items was not an irregularity, do you?

(Same objection as above.)

A. It was decidedly irregular.

Q. And anything in your previous answers to the contrary, you do not wish to be understood?

A. No, sir.

Same objection.

Q. Now, I will ask you, Mr. Watters, whether or not there was a record kept in the Fidelity bank, called "Daily statements," in which there was for every day of the life of the bank, a statement of the amount of currency on hand, and of gold—that is, including gold and silver, and, also, a statement of the amount of reserve in the bank; that the bank had on hand?

A. There was a daily statement book, in which was kept the daily condition of the bank; the top of the page stated the amount of gold, silver, legal tender, etc., that is, the money, that was in the possession of the bank.

Q. That is the first thing written in the book, at the top of each page?

A. Yes, sir.

Q. I will ask you whether or not you know of discrepancies between the amount of currency, gold and silver, or reserve, or all of that that appears above that line in that book, from the actual state

of the cash of the bank; and whether or not the report, as in that book, was true according to the actual amount of cash, as dis-
212 tinguished from cash items?

(Objected to by counsel for plaintiff, as incompetent and irrelevant.)

A. The book from beginning to end, in nearly all instances, is incorrect.

Q. When did you know of that incorrectness for the first time?

A. I noticed it from day to day right straight ahead.

Q. Do you call that an irregularity?

A. Yes, sir.

Q. I will ask you whether or not you knew of Chatfield & Woods, and of Mr. Morehead having checks carried in the cash, for the purpose of swelling the deposits of the bank, while they were directors of the bank?

(Same objection by counsel for defendants.)

A. As for what purpose they were deposited, I cannot say, but I know it to be a fact that their checks were deposited and held in cash, and the amount placed to their credit.

Q. Did you know it at the time?

A. Yes, sir.

Q. Did you know anything in reference to a note or a check of Briggs Swift, with which the same thing was done?

A. As for a note being given, I cannot state that, as I never saw it; but there is a record on the books of the bank crediting Mr. Swift with $100,000 and charging call loans, and afterwards charging Briggs Swift, and crediting call loans.

A. Do you know anything, of your own personal knowledge, of what was done on March 16th or 17th, at the time the bank examiner was at the Fidelity national bank, with reference to the cash items, and furnishing currency, to be on hand in case an examination was made?

A. There was some few cash items charged through the account of E. L. Harper or E. L. Harper & Company, I am not sure now which it was. There was also gotten from the Metropolitan national bank, and from the Queen City national bank, $150,000 in currency.

Q. Was it returned to them?

A. Yes, sir.

Q. Do you know that of your own personal knowledge?

A. Yes, sir; I returned the money to the Metropolitan bank, and brought the money up from the Queen City national bank.

Q. Did you speak of this to anybody at the time?

A. I think it was known by every clerk in the bank.

Q. And talked about?

213 A. I think there was mention made of it to some clerks.

Q. Was any mention made of it to the directors, or any of them?

A. I could not say; not that I know of.

Q. Could you say that it was not mentioned to the directors or any of them?
A. No, sir; I could not.

Recross-examination by Mr. McDOUGALL:

Q. Are banks in the habit of borrowing from each other when the bank examiner comes around?
A. Well, I could not say; I have heard it.
Q. Were you connected with any other banks?
A. Yes, sir.
Q. Did they carry cash items the same way as the Fidelity bank did?
A. Yes; they carried some—they carried some at the Third national bank, when I was there.

Re-redirect examination by Mr. WILBY:

Q. When were you with the Third national bank?
A. In 1879 and 1880.
Q. Mr. Baldwin was there then?
A. Yes, sir.
Q. And Mr. Harper was there, in the board, at that time?
A. Yes, sir.

EXHIBIT 1.

(Copy.)

Statement of J. H. Watters.

The Fidelity national bank.

CINCINNATI, O., *Jan. 29th*, 1887.

First national bank, New York city, N. Y.

GENTLEMEN: We beg to confirm our several telegrams of this date, as follows:

"Wire lowest price on three hundred and forty thousand United States fours to be placed with Treasurer to secure our Government deposit. In case we buy and pay for the bonds, will place to our credit, at a low rate, four hundred thousand to count as reserve till we receive our Government deposit. We not to check against the amount. Provided we trade, will give you part of our New York account as per terms of your recent proposition. Our balance now is over four hundred thousand. Answer quick."

Your reply:

214 "Will sell fours at twenty-eight and three quarters, and make loan as requested at three per cent. Answer promptly, as Government market is very strong."

Our second telegram to you:

"Telegram received. We accept, and will take the three hundred and thirty thousand fours at twenty-eight and three-quarters. We understand you to deliver them in Washington at this price. We

remit today. You can place loan to our credit at your rate Monday."

Yours respectfully,

(Signed) E. L. HARPER, *V. P.*

2—(Copy.)

The Fidelity national bank.

CINCINNATI, *Jan. 29th*, 1887.

First national bank, New York city, N. Y.

GENTLEMEN: We send you our first letter for credit today—$435,441.41. Please charge to our account, and forward by first express the $330,000 U. S. four per cents. of 1907 purchased from you today, to the Treasurer of the United States at Washington, D. C., for our account as security for United States deposit of public moneys. Please send with the above the $10,000 we send you from here, making the full amount $340,000.

If it will make no change in your arrangements, you need only deposit for us at present, as a reserve, $200,000 of the loan, and the balance when we wire you we desire it; but if it makes any difference, you can place the whole $400,000 as arranged.

We will receive from the United States about $20,000 per day, after they commence to deposit; but, unless our bonds arrive in Washington by February 1st, we fear another bank here will receive their deposit first.

We trust our account will prove profitable and mutually satisfactory. Thanking you for your promptness, we remain,

Yours respectfully,

(Signed) E. L. HARPER, *V. P.*

3—(Copy.)

The Fidelity national bank.

CINCINNATI, OHIO, *March 17th*, 1887.

First national bank, New York city, N. Y.

GENTLEMEN: We thank you for your promptness in reference to placing the $300,000 to our credit, making $500,000 in all. The bank examiner is going through us today, and we were a little short in our reserve. We had only charged you with the $400,000, as previously agreed, and we gave him our balance with you as $405,982.34; so please make this agree as to date when he writes for our balance.

215

We will credit you the other $100,000 at close today. We are under obligations for your promptness, and we will pay off and give you a good account soon.

Respectfully yours,

(Signed) E. L. HARPER, *V. P.*

4—(Copy.)

NEW YORK, *March* 19, 1887.

Personal.

E. L. Harper, Esq., vice-pres. Fidelity national bank, Cincinnati, Ohio.

DEAR SIR: We note what you say in your favor of the 17th regarding the credit made to your account and your explanation of the purpose for which you desired it. It is proper to say to you that it would not be practicable for us to antedate a credit of this kind. We could not, if we desired, change our daily balances to and including the date designated by you. The best we could do would be simply to state the balance of your account as it appeared on our books at any given date, concerning which inquiry might be made.

We venture to make the suggestion to you that it is in every way better to meet squarely any criticism attaching to a deficient reserve than to endeavor to mend it by a subsequent transaction, which, to be effective, would need to be antedated. Any examination into such a transaction could not fail to be prejudicial to the institution desiring to benefit by it.

Yours respectfully,

(Signed) E. SCOFIELD, *Cashier.*

5—(Copy.)

The Fidelity national bank.

CINCINNATI, *April* 3, 1887.

First national bank, New York city.

GENTLEMEN: In case we pay what we now owe you, would it be agreeable to discount two of our certificates of deposit of
216 $200,000 each, due in 30 and 60 days, secured by our choice bills receivable, with over ten per cent. margin? We will not be borrowers after our additional capital is paid and merchandise moves more freely on opening of navigation. We will thereafter keep good balances. We would only draw a part of the discount and our balance would probably not average below $400,000, but we prefer to have it this way. Your early reply will oblige,

Respectfully yours,

(Signed) E. L. HARPER, *V. P.*

6—(On letter-head, same as Exhibit No. 4.)

It will be entirely agreeable to make the arrangement you propose. As the loan would be, in this case, without restrictions and subject to your check, the rate would be five per cent., which we think a fair one in the present state of our money market.

7—(Copy.)

The Fidelity national bank.

CINCINNATI, *April* 28, 1886.

E. Scofield, Esq., cashier First national bank, New York city.

DEAR SIR: Yours of the 25th inst. is at hand, and in accordance therewith we hand you for credit our two certificates of deposit, Nos. 499 and 500 of $200,000 each, due June 27th and July 2nd, fixed five per cent. Please charge our account with the present loan and hand me statement at close, the 30th inst.

Enclosed herewith, we hand you as collateral to the above:

Riverside Iron & Steel Co., Mar. 28, 1887, 4 mos., $25,000.
Riverside Iron & Steel Co., Mar. 31, 1887, 4 mos., $25,000.
Riverside Iron & Steel Co., Apr. 7, 1887, 4 mos., $25,000.
Swift's iron & steel works, Apr. 26, 1887, 4 mos., $25,000.
Swift's iron & steel works, Apr. 21, 1887, 4 mos., $25,000.
Swift's iron & steel works, Apr. 16, 1887, 4 mos., $25,000.
Swift's iron & steel works, Apr. 12, 1887, 4 mos., $25,000.
E. L. Harper & Co., Apr. 4, 1887, 4 mos., $50,000.
E. L. Harper & Co., Apr. 18, 1887, 4 mos., $50,000.
Wilshire, Eckert & Co., Apr. 14, 1887, 4 mos., $30,000.
Wilshire, Eckert & Co., Apr. 27, 1887, 4 mos., $30,000.
217 Warder, due Sept. 8, 1887, $3,500.
Champion, due Sept. 17, 1887, $4,500.
Champion, due Sept. 26, 1887, $5,000.
Lee, due Aug. 23, 1887, $3,500.
Champion, due Aug. 19, 1887, $5,872.20.
Warner, due Aug. 12, 1887, $3,624.98.
Warner, due Aug. 8, 1887, $4,926.57.
Aultman, due Aug. 15, 1887, $10,000.
Aultman, due Aug. 18, 1887, $10,000.
Aultman, due Aug. 23, 1887, $10,000.
Aultman, due Aug. 29, 1887, $10,000.
Aultman, due Aug. 31, 1887, $10,000.
Warder, due Aug. 7, 1887, $2,000.
Champion, due Aug. 7, 1887, $5,500.
Champion, due Aug. 18, 1887, $3,500.
Champion, due Aug. 8, 1887, $4,280.
Champion, due July 18, 1887, $4,370.
Champion, due July 29, 1887, $5,451.
Champion, due July 5, 1887, $4,300.
Lee, due July 18, 1887, $3,420.

Respectfully yours,

(Signed) E. L. HARPER, *V. P.*

(8.)

(2196.)

Geo. F. Baker, pres. 10-7-'86—10 M.

First national bank.

NEW YORK, *April* 30, 1887.

Fidelity national bank, Cincinnati, Ohio:

Yours of the 28th received and contents noted.

Respectfully yours, E. SCOFIELD, *Cashier.*

We credit your account $400,000 loan at five per cent., as requested. We charge your account balance to debit of special account, with interest at per statement herewith, $501,191.78.

Statement of Mr. Watters as to the Facts Connected with the Transaction of which the Foregoing is the Correspondence.

On February 12th, 1887, E. L. Harper came to me with a charge ticket (copy of which is hereto attached and made a part hereof, marked "Watters Exhibit A"), instructing me to make out a deposit ticket (a copy of which is hereto attached, made a part
218 hereof and marked "Watters Exhibit B"), asking me to place the same to the credit of his account and charge the First National Bank of New York. The entries for the crediting of the same were made by the different clerks in their respective departments, from the charge ticket, and E. L. Harper received a credit for two hundred thousand ($200,000) dollars.

On February 28, 1887, E. L. Harper came to me with a charge ticket (copy of which is hereto attached, made a part hereof, and marked "Watters Exhibit C"), and requested me to make out a deposit ticket (copy of which is hereto attached, made a part hereof, and marked "Watters Exhibit D"), placing two hundred thousand ($200,000) dollars to his credit, and charging the First National Bank of New York. The proper entries for this were made by the different clerks on their respective books from this ticket.

On March 17th, 1887, E. L. Harper came to me and requested me to make out a charge ticket (copy of which is hereto attached, and made a part hereof, marked "Watters Exhibit E"), and instructed me to make out a deposit ticket (copy of which is hereto attached, made a part hereof and marked "Watters Exhibit F"), placing to his credit one hundred thousand ($100,000) — and charging the First National Bank of New York. The proper entries for this were made on the books of the Fidelity, by the different clerks in their respective departments.

These entries, in all, gave E. L. Harper a credit on the books of the Fidelity national bank, of five hundred thousand ($500,000) dollars, and charged to the First National Bank of New York, with a like amount.

When Mr. Harper desired to reduce the loan in the First national bank from five hundred thousand ($500,000) to four hundred thou-

sand ($400,000) dollars, instead of making the proper entries, he entered on the draft register a credit to the First National Bank of New York, a draft No. 2700, on the First National Bank of New York City, for one hundred thousand ($100,000) dollars; this having gone to the credit of the First New York, reduced the charge to them to four hundred thousand ($400,000) — making the total charge to the Fidelity agree in total with the amount in the First National of New York; giving for the same his check on his account with the Fidelity.

This, in fact, had the same effect as if the proper entries had been made.

When the loan to the Fidelity national bank by the First national bank was reduced from five hundred thousand ($500,000) to four hundred thousand ($400,000) dollars, the two certificates of deposit (copies of which are hereto attached, made part hereof, and marked "Watters Exhibit G," and "Watters Exhibit H") were forwarded to the First National Bank of New York.

I also attach hereto a copy of the account of the First National Bank of New York, as it appeared on the books of the Fidelity national bank, marked "Watters Exhibit I."

I also attach hereto and make part hereof, copies of the accounts of the First National Bank of New York City, with the Fidelity national bank, "Special account" marked, "Watters Exhibit J," and "Regular account" "Watters Exhibit K."

From this it appears that when the first loan of four hundred thousand (400,000) dollars was made, all that was placed to the credit of the Fidelity national bank was two hundred thousand ($200,000) dollars. This was done in the following manner: by placing to the credit of the Fidelity national bank, in the regular account, two hundred thousand ($200,000) dollars, and charging as an overdraft in the special account a like amount.

As will be seen from the letter heretofore quoted, Mr. Harper requested that only this amount be placed to the credit of the Fidelity national bank.

On March 17th, 1887, a like entry was made on both accounts for three hundred thousand (300,000) dollars.

On April 28th, 1887, when Mr. Harper requested a new loan of four hundred thousand ($400,000) —, the regular account was charged with the five hundred thousand ($500,000) dollars, and the special account credited with the same amount. And from the two certificates of deposit a new loan was made for four hundred thousand ($400,000) dollars.

The proper entry that should have been made on the books of the Fidelity bank, is as follows:

As there has been an outstanding liability created by E. L. Harper against the Fidelity national bank for four hundred thousand ($400,000) — for which he had not paid any consideration to the Fidelity, and for which certificates of deposit had been issued, instead of crediting his own account with the amount of these obligations, he should have credited bills payable and charged the First National

Bank of New York. The transaction as it was entered gave him a fictitious credit of $400,000.00, to which he was not entitled.

On February 28th, 1887, the following letter was sent to the Chemical National Bank of New York City, by the Fidelity national bank.

220 U. S. depository.

The Fidelity national bank.

Capital, $1,000,000.

CINCINNATI, O., *February 28th*, 1887.

Wm. J. Quinlan, Jr., Esq., cashier Chemical national bank, New York city, N. Y.

DEAR SIR: Enclosed herewith, we hand you for credit, our certificate of deposit, No. 345, for $300,000 with bills as collateral, as follows:

Jung Brewing Co., due June 24, 1887, $25,000.
Jung Brewing Co., due April 24, 1887, 10,000.
Swift's iron & steel works, due May 18, 1887, $25,000.
Swift's iron & steel works, due May 28, 1887, $25,000.
J. W. Wilshire, endorsed by:
J. V. Lewis, due May 28, 1887, $25,000.
J. V. Lewis, June 28, 1887, $25,000.
J. V. Lewis, July 28, 1887, $25,000.
J. V. Lewis, Aug. 28, 1887, $25,000.
Riverside I. & S. works, due May 22, 1887, $15,000.
Riverside I. & S. works, due May 31, 1887, $15,000.
C. Aultman & Co., due May 16, 1887, $10,000.
C. Aultman & Co., due May 20, 1887, $10,000.
C. Aultman & Co., due May 23, 1887, $10,000.
C. Aultman & Co., due May 27, 1887, $10,000.
C. Aultman & Co., due May 31, 1887, $10,000.
Champion Machine Co., due June 1, 1887, $5,500.
Champion Machine Co., due June 1, 1887, $5,378.01.
Champion Machine Co., due June 10, 1887, $4,350.
Champion Machine Co., due June 10, 1887, $4,610.
Champion Machine Co., due June 11, 1887, $5,487.
Champion Machine Co., due June 15, 1887, $5,700.
Champion Machine Co., due June 22, 1887, $5,620.
Champion Machine Co., due June 24, 1887, $5,850.
Champion Machine Co., due July 24, 1887, $4,500.
Champion Machine Co., due July 28, 1887, $5,200.
Champion Machine Co., due Aug. 3, 1887, $5,000.
Champion Machine Co., due Aug. 20, 1887, $4,500.

We desire to keep a large reserve with you, and trust you will make the rate as low as you proposed some time since. Please place the amount to our credit and advise the rate.

Respectfully yours,
(Signed) E. L. HARPER, *V. P.*

221 Accompanying the above letter was a certificate of deposit, a copy of which is hereto attached, made part hereof, marked "Watters Exhibit L."

On March 2nd, 1887, the Chemical National Bank of New York City forwarded to the Fidelity national bank the following letter: On the letter-head of the

Chemical national bank.

NEW YORK, *March 2nd*, 1887.

A. Baldwin, Esq., cashier.

DEAR SIR: Your favor of the 28th inst., has been received. And we credit Fidelity national bank $300,000—and shall be considerate as to rate of interest when the loan is paid—

I presume that you are aware of the very material change in rates within the past 2 or 3 days.—Loans for 60 and 90 days on stock exchange collaterals (R. R. stocks and bonds) which were ruling 4½ per cent. last week, are now 5½ to 6 per cent. I mention this to show you the present condition of the money market.

Respectfully, WM. J. QUINLAN, JR., *Cashier.*

On March 2nd, 1887, Mr. E. L. Harper came to me and requested me to make out a charge ticket crediting his account and charging the Chemical National Bank of New York City with three hundred thousand ($300,000) dollars. (A copy of which charge ticket is hereto attached, made part hereof, and marked "Watters Exhibit M." Copy of the deposit ticket, also, is hereto attached, marked "Watters Exhibit N.")

The proper entries for the charge ticket and the deposit ticket, crediting the account of E. L. Harper, and charging the account of the Chemical National Bank of New York City, were made on the proper books of the Fidelity national bank.

On May 21st, 1887, the Fidelity national bank forwarded to the Chemical National Bank of New York City the following letter:

U. S. depository.

The Fidelity national bank.

CINCINNATI, O., *May 21st*, 1887.

Chemical national bank, New York city.

GENTLEMEN: Enclosed herewith we hand you to hold as collaterals the following bills:

222 H. S. Bundy, demand, $50,000.
Swift's iron & steel works, May 13, 1887, 4 mos., $25,000.
Swift's iron & steel works, May 18, 1887, 4 mos., $25,000.
J. W. Wilshire, Apr. 28, 1887, 5 mos., $25,000.
Riverside Iron & Steel Co., due Sept. 25, 1887, $15,386.35.
Riverside Iron & Steel Co., due Oct. 5, 1887, $15,386.35.
Whiteley, Fassler & Kelley, Apr. 1, 1887, 6 mos., $4,633.07.
Whiteley, Fassler & Kelley, Apr. 1, 1887, 7 mos., $5,343.07.
Whiteley, Fassler & Kelley, Apr. 1, 1887, 8 mos., $3,892.10.

Whiteley, Fassler & Kelley, Apr. 20, 1887, 6 mos., $5,608.09.
Whiteley, Fassler & Kelley, Apr. 25, 1887, 8 mos., $4,413.17.
Whiteley, Fassler & Kelley, May 2, 1887, 5 mos., $5,370.04.
Whiteley, Fassler & Kelley, May 2, 1887, 6 mos., $4,000.00.
Whiteley, Fassler & Keiley, May 2, 1887, 7 mos., $4,890.10.
Whiteley, Fassler & Kelley, May 2, 1887, 8 mos., $4,850.00.
Whiteley, Fassler & Kelley, May 10, '87, 5 mos., $5,640.00.
Whiteley, Fassler & Kelley, May 10, '87, 6 mos., $5,872.00.
Whiteley, Fassler & Kelley, May 10, '87, 7 mos., $5,710.52.
Whiteley, Fassler & Kelley, May 10, '87, 8 mos., $4,200.00.
Whiteley, Fassler & Kelley, May 16, '87, 6 mos., $5,209.20.
Whiteley, Fassler & Kelley, May 16, '87, 7 mos., $5,178.40.
Will you kindly return me the following:
C. Aultman & Co., due in May, five pieces.
Swift's iron & steel works, due in May, two pieces.
Champion Machine Co., due in June, eight pieces.
Jung Brewing Co., due in June, one piece.
J. W. Wilshire, due in May, one piece.
Riverside Iron & Steel Co., two pieces, due in May.
We will pay the loan July 15th, 1887, if agreeable to you, and will pay interest now to that date.

Respectfully yours,
(Signed) E. L. HARPER, *V. P.*

In the transaction above described, instead of the account of E. L. Harper being credited, and the account of the Chemical national bank being charged with $300,000, an account called "Bills payable" should have been credited and the account of the Chemical national bank been charged with this amount of money, as this was an outstanding obligation issued by the officers of the Fidelity national bank; this gave E. L. Harper a fictitious credit of $300,000.

J. HARRY WATTERS.

223 And also WILLIAM BEATTY MCCAUSLEN, recalled on behalf of plaintiff, having been previously sworn, in this case, testified as follows:

Direct examination by Judge WORTHINGTON:

Q. 63. Mr. McCauslen, have you brought with you the stock ledger of the Fidelity national bank?

A. I produce here what I am informed is the stock ledger of the Fidelity national bank; yes, sir.

Q. 64. It is one of the books that has been in charge of the receiver of the Fidelity national bank, ever since its failure, is it?

A. Yes, sir; it is.

Q. 65. And has always been received as the stock ledger of that bank?

A. Yes, sir.

Q. 66. On what pages of that stock ledger, Mr. McCauslen is the account of E. L. Harper, as a stockholder, found?

A. E. L. Harper's account is found on pages 10, 11, 12 and 13 of this stock ledger.

Q. 67. Pages 10, 11, 12 and 13?

A. Yes, sir.

Counsel for plaintiff now offers in evidence the account just referred to, and asks that the examiner makes a copy of the same, attach it hereto and marked it "Exhibit —," it being agreed between counsel on both sides that a copy of same may be used in lieu of the original.

Counsel for defendant interposes an objection as to the competency and relevancy of the account just offered.

Q. 68. On what page is the account of A. P. Gahr, as a stockholder of the Fidelity national bank, found?

A. The account of A. P. Gahr is found on page 16.

The account of A. P. Gahr, as a stockholder, on page 16 of the stock ledger, is offered in evidence by counsel for plaintiff; and it is agreed between counsel that a copy of the same may be used and attached hereto, in lieu of the original, marked "Exhibit —."

Same objection as above interposed by counsel for defendant.

Q. 69. On what page of the stock ledger does the account of J. H. Matthews, as a stockholder, appear, Mr. McCauslen?

A. The account of J. H. Matthews, as a stockholder, is found on page 14, of the stock ledger.

The account just referred to is offered in evidence by
224 counsel for defendant; and it is agreed between counsel that a copy of same may be made, and used, and hereto attached, in lieu of the original, marked "Exhibit —."

At this point the taking of further testimony was adjourned to February third, 1896.

Monday morning, ten o'clock, February 3d, 1896, at the office of David Armstrong, receiver of the Fidelity national bank, in the Masonic temple, Third and Walnut streets, Cincinnati, Ohio, met, pursuant to adjournment.

Present on behalf of plaintiff, Honorable William Worthington.

Present on behalf of defendant, Honorable John W. Herron.

J. HARRY WATTERS, called on behalf of the defendant, being first duly sworn, testifies as follows:

Direct examination by Mr. HERRON:

Q. 1. Mr. Watters, state whether or not you are the same J. Harry Watters who testified before in the present case?

A. I am.

Q. 2. State whose duty it was, if you know, to examine the monthly accounts rendered between the Chemical National Bank of New York and the Fidelity national bank, in the spring of 1887, and explain the manner in which this was done?

A. It was my duty, with the assistance of Edward Hicks. Sometimes I would examine the accounts in full all by myself; or, if I was too busy, Mr. Hicks might have done it at times. I may state here that Mr. Hicks is now dead.

The manner that we pursued in examining or checking up an account current is as follows: We would take our charges and checks with the credits that appeared on the account-current sheet of the bank forwarded to us; and the same way with the charges and our credits. Then, if there were any items that did not check, they would be so entered on our reconcilement sheet, with our balance and their balance, which would make the reconcilement sheet balance in itself.

Q. 3. What book of the Fidelity national bank would you
225 have, to compare the charges and credits between the two accounts?

A. The general book-keeper's journal and the draft register.

Q. 4. Refer to the account current rendered by the Chemical national bank for the month of March, 1887, referred to in your former evidence as "Watters Exhibit No. 10," and state who made the checks to the items on said account?

A. Ed. Hicks.

Q. 5. Mr. Watters, can you now state, in the reconcilement of the account, as to who had the account rendered by the Chemical national bank, and who examined the books of the Fidelity national bank?

A. I cannot state positively. I know that these check-marks are in Ed. Hicks' handwriting—that is the reason I know that he checked this.

I want to change my answer to your question as to what book of the Fidelity I had before me in comparing the two accounts, where I answered the general book-keeper's journal. I have now before me what was known as the "book of the Chemical National Bank of New York," containing all the debits and credits, except the drafts; and from this book the debits and credits were checked on to the account current, except the drafts, and they were checked from the draft register. These are all my check-marks here. I find, by looking at this book, that I recognize my own check-marks, and I must, then, at that time, have called off to Mr. Hicks the debits and credits.

Q. 6. Is that part of the Fidelity's books?

A. It is; yes, sir.

Q. 7. When was that book prepared?

A. During the existence of the Fidelity bank.

Q. 8. Well, when in reference to the month of March?

A. From day to day, as the business was conducted.

Q. 9. And the check marks in that book are made by you?

A. Yes, sir.

Q. 10. And the check-marks on the account are made by Hicks?

A. Yes, sir.

Q. 11. Read from that book the item of three hundred thousand ($300,000.00) dollars, about which this controversy has arisen.

A. On page 78 of this book, under date of March 2nd, is a charge to the Chemical national bank, "transfer of funds, $300,000.00."

226 Counsel for defendant offers in evidence the book from which witness has been reading; and the same is marked "Watters Exhibit A. E. V. R., special examiner."

Q. 12. Mr. Watters, state what present recollection you have as to whether at that time you noticed on the account of the Chemical national bank, in front of the item of $300,000.00, the words "tem. loan"?

Question objected to by counsel for plaintiff.

A. I cannot say now that I remember at the time this account was checked, that I noticed particularly the item "tem. loan;" but at some time—whether at that particular time, or at the present time, I have always mistaken this word "tem. loan" as "time loan."

Answer objected to by counsel for plaintiff, in so far as it is responsive to the question, for the reason that the question is objected to; and to the latter part of the answer as to the witness having mistaken the words "tem. loan" for "time loan," as irrelevant and immaterial.

Q. 13. State in what manner that item, on the Chemical National Bank's account, of $300,000.00 first appeared on the books of the Fidelity national bank; and what knowledge you had at the time you saw the credit on the Chemical account as to its correctness.

Question objected to by counsel for plaintiff, on the ground that the matter has been heretofore examined into; and is not within the scope of the——

A. This item appeared first on the books of the Fidelity national bank, on the date of March 2nd, in the shape of a charge to that bank; which entry was made from a charge ticket which read, "Credit E. L. Harper, transfer of funds, charge Chemical national bank." If I remember rightly, I made out this charge ticket myself, at the instruction of Mr. Harper.

Q. 14. You have not answered the last part of my question, as to what knowledge you had at the time you saw the credit on the Chemical account as to its correctness.

A. I cannot say that at that time I did see the account current of the Chemical national bank; for, as I explained before, I checked the debits and Hicks checked the credits, but during the course of checking, this item was checked off between us.

Q. 15. At that time, however, you knew, did you not, that that sum had been charged to the Chemical national bank and credited to E. L. Harper on the books of the Fidelity national bank?

Question objected to by counsel for plaintiff.

A. I did.

227 Q. 16. If, at the time you examined the account current of the Chemical national bank, Mr. Watters, you had noticed

the words, "tem. loan," with your previous knowledge of the manner in which that item had appeared on the Fidelity's books, what impression would such information have made upon your mind, as the book-keeper of the Fidelity national bank?

Question objected to by counsel for plaintiff as immaterial and irrelevant.

A. Having previously made the entry crediting Mr. Harper, and charging the Chemical national bank, I would have checked this item as I did, without any hesitancy, and, as I supposed at that time, that it was a loan of Mr. Harper's. For the entry that I had made would indicate that to me.

Counsel for plaintiff objects to the answer.

Q. 17. Had you, or not, at that time, or any subsequent time prior to the failure of the Fidelity national bank, any knowledge or belief that the Fidelity national bank had borrowed of the Chemical national bank three hundred thousand ($300,000) dollars?

Question objected to by counsel for plaintiff as incompetent and irrelevant.

A. I did not.

Q. 18. State whether or not, at that, or any subsequent time prior to the failure of the Fidelity national bank, you informed either any officer or director of that bank that a charge of three hundred thousand ($300,000) dollars, on the books of the Fidelity national bank, was marked as a temporary loan to the Fidelity national bank, or that any such words appeared in the account rendered?

Question objected to by counsel for plaintiff.

A. No, sir; I did not.

Q. 19. Mr. Watters, in your testimony given in the directors' suit, you have appended as a part of your evidence copies of letters written by Mr. Harper to Mr. Quinlan, dated February 28th, 1887; and Mr. Quinlan's reply, and a subsequent letter of Harper to Quinlan. I will now ask you where you obtained those copies when you first had knowledge that they existed?

A. I got them from the books of the Fidelity, which were in the possession of the receiver, after the failure.

Q. 20. Was that first letter in his books?

A. Well—I can't say now—which first letter?

Q. 21. The one written by Harper to Quinlan.

A. I don't know where I did get them. It was either there, or I got copies of them—but I don't know where they come from. I am not sure whether these are the copies furnished the receiver by the Chemical national bank or not.

228 Q. 22. I will refer you to your previous testimony in this case, and I will ask you whether that will refresh your memory as to those facts. (Handing book to witness.)

Objected to by counsel for plaintiff.

A. I read in the testimony that I have stated here that I did not

find a copy of the letter in the books of the Fidelity national bank. Whether this is the fact or not, I cannot state now.

Q. 23. At that time, however, you had examined the books of the Fidelity national bank; have you examined them since then?

Question objected to by counsel for plaintiff.

A. I have not examined them since then; no, sir.

Cross-examination by Judge WORTHINGTON:

Q. 1. Mr. Watters, are you the same J. Harry Watters who testified in the case of David Armstrong, receiver of the Fidelity national bank *vs.* Briggs Swift and others, case No. 4054, in the United States circuit court for the southern district of Ohio, and whose testimony is given on pages 578 to 579 of the printed record of the testimony in that case?

A. I am.

Q. 2. Mr. Watters, what was the position in the Fidelity national bank of Edward Hicks, who assisted you in checking off the amount between the Fidelity national bank and the Chemical national bank?

A. He was one of the assistant general book-keepers.

Q. 3. A subordinate under you?

A. Yes, sir.

Q. 4. As a matter of general usage, was he the person who assisted in checking off the monthly accounts of the Chemical national bank?

A. He assisted me with all the accounts; and whether he assisted me with the Chemical always, that I cannot say.

Q. 5. Was it your practice in such cases, for you to have before you the account as kept by the Fidelity national bank, and for Mr. Hicks, or the other person who assisted you, to have the account as rendered by the corresponding bank, as you have testified was done with reference to this March account; or would they vary according to your convenience?

A. Yes, it would vary according to the convenience, or the time which one of us had. Sometimes I would call to him, and sometimes he would call to me; and sometimes one of us would check the whole account by ourselves—that is, checking off the bank accounts. The different ones would assist—it would not always be Mr. Hicks.

229 Q. 6. From an inspection of this exhibit heretofore offered in this case, marked "Watters Exhibit No. 10," are you able to state whether or not it was necessary to make any reconcilement sheet for that account, for that month?

A. I cannot state now whether a reconcilement sheet was made or not.

Q. 7. I understand, then, that there is nothing there upon the face of the account, as kept in the Fidelity national bank, or as furnished to the Fidelity national bank by the Chemical national

bank, that enables to tell whether a reconcilement sheet was made out for that particular month?

A. No, sir.

Q. 8. Mr. Watters, look at the papers I now hand you, heretofore offered in evidence in this case, and marked by the examiner, "Reconcilement sheet for Chemical national bank, March, 1887, Effie V. Ryan, special examiner," and state whether or not you recognize that as being the reconcilement sheet between the Chemical national bank and the Fidelity national bank for the account of that month?

A. Yes, sir; it is.

Q. 9. Can you tell me in whose handwriting that reconcilement sheet is?

A. That is in the handwriting of Edward Hicks.

Q. 10. Do you recognize from the character of the check-marks who it was that made them?

A. Not now, I can't; no, sir.

Q. 11. You spoke about the others, and I didn't know but maybe there was something in the pencil, or something else, by which you could identify them here as well as in the other two accounts. How is it that you are able to recognize the check-marks upon the book of the Fidelity national bank in which the amount was being made by you, and upon the Chemical National Bank account as made by Mr. Hicks?

A. On the account-current sheet, as made by Mr. Hicks, are his pencil figuring and writing that I recognize as Hicks' work; while in the book, as near as I can state, I think they are my check-marks. But I would not want to take a very strong oath and have to rest on what I would state, because I might be mistaken.

Q. 12. Your statements to that effect, then, have been from a process of reasoning from the pencil figures and letters that appeared upon the account as furnished by the Chemical national bank?

A. That's right; yes, sir.

Q. 13. The words at the foot of this sheet, marked "Reconcilement sheet for March, 1887," on the right-hand side, "To balance
230 account .51" are in Mr. Hicks' handwriting, are they?

A. Yes, sir.

Q. 14. With reference to explaining this reconcilement sheet, Mr. Watters, the words "We charge" mean that the Fidelity National Bank books charge; and "We credit," shows that the Fidelity credits, and, *vice versa*, "You charge" means that the Chemical charges, and "You credit" means that the Chemical credits? In other words, "We" means the Fidelity, and "You" means the Chemical bank?

A. Yes, sir.

Q. 15. And that, of course, was uniform in all of the reconcilement sheets?

A. Yes, sir. Under the item of "We charge;" that would be the Fidelity charges and the Chemical does not credit. Under the item "We credit" would be that the Fidelity credits and the Chemical does not charge. Under the item "You charge" would mean that

the Chemical charges, and the Fidelity does not credit. Under the item "You credit" would mean that the Chemical credits, and the Fidelity does not charge. Then after putting together these four items, together with the balance of each bank the reconcilement sheet would balance as explained before.

Q. 16. In other words, the reconcilement sheet is intended to show amounts that are not charged or credited upon both accounts?

A. Yes, sir.

Q. 17. As a corresponding charge and credit?

A. Yes, sir.

Q. 18. Mr. Watters, I hand you now a paper previously offered in evidence in this case, and marked "Reconcilement sheet for April, 1887, E. V. R., special examiner," and ask you whether you recognize that as the reconcilement sheet between the Fidelity national bank and the Chemical national bank, prepared in the Fidelity national bank, of their account for the month of April, 1887?

A. I do.

Q. 19. That is in whose handwriting?

A. Edward Hicks.

Q. 20. And the explanation you have made with reference to the March account applies, I presume to that, with the necessary change for the months?

A. Yes, sir.

Q. 21. I hand you now a paper heretofore offered in evidence in this case, and marked "Reconcilement sheet for May, 1887,
231 E. V. R., special examiner," and ask if you recognize that as being the reconcilement sheet prepared by the Fidelity national bank as the account between the Fidelity and the Chemical for the month of May, 1887?

A. Yes, sir; I do.

Q. 22. In whose handwriting is it?

A. Edwards Hicks.

Q. 23. I hand you, also, a paper heretofore offered in evidence in this case, and marked "Reconcilement sheet for June, E. V. R., special examiner," and ask you if you recognize that as the reconcilement sheet prepared in the Fidelity national bank, as the account between the Fidelity national bank and the Chemical national bank for the month of June, 1887?

A. I do.

Q. 24. That is written by whom?

A. This was prepared by Mr. Hicks, and is all in his handwriting. But you will find in lead pencil names written which are in the handwriting of John T. Colling.

Q. 25. The lead-pencil names and figures that you speak of are upon the third and fourth pages of the sheet?

A. Yes, sir.

Q. 26. And with reference to that part of the sheet which gives the drafts outstanding?

A. The number of the draft, the date it was drawn and the name of the party *to* (on) whom it was drawn, is all in the handwriting of

John T. Colling; and, to the best of my recollection, was done after the failure of the Fidelity national bank.

Q. 27. The figures in ink, however, were they, or not, prepared at the time that the reconcilement sheet was made?

A. Yes, they were prepared at the time, and done by Hicks.

Q. 28. I hand you another paper, Mr. Watters, already offered in evidence in this case, consisting of two sheets pinned together, and marked "Letter as to reconcilement of April account," and ask you if you recognize that paper?

A. I do.

Q. 29. In whose handwriting is it?

A. The letter written to Mr. Quinlan is in the handwriting of Mr. Hicks, and on the sheet afterwards returned by the Chemical national bank to the Fidelity, is the answer to this letter, and is written in the handwriting of some one connected with the Chemical national bank, I suppose, for it is signed "W. J. Quinlan, Jr., cashier."

232 Q. 30. This letter bears upon it the stamp "Fidelity national bank, per Watters"——

A. Yes, sir.

Q. 31. This letter was written by Mr. Hicks under your direction, then?

A. Yes, sir; and the reason my name appears on there is that we wanted the letter, when returned to the Fidelity, to be returned to my desk.

Q. 32. I hand you another paper, which has been offered in evidence heretofore in this case, and marked "Letter as to differences in May reconcilement, E. V. R., special examiner," purporting to be written by the Fidelity national bank to the Chemical national bank, and to be signed by Hicks, with a notation at the end, which has been testified to have been made in the Chemical national bank, and ask you if you recognize that document?

A. Yes, sir; I do. It is in the handwriting of—this is made by Hicks, and was returned to the Fidelity national bank by the Chemical national, in the writing of some of the clerks of that institution.

Q. 33. Look, also, at another document, which I show you, which I now hand you, heretofore offered in evidence in this case, marked "Armstrong letter to Chemical, July 12th, 1887," and state if you recognize that?

A. I do; yes, sir.

Q. 34. By whom was that written?

A. Edward Hicks. The lead-pencil notations are those of some one in the Chemical national bank.

Q. 35. Mr. Hicks was, at that time, in the employ of the receiver of the Fidelity national bank?

A. Yes, sir.

Q. 36. Look at this other document, which I now hand you, which has been heretofore offered in evidence in this case, and marked "Attempted reconcilement of June account, E. V. R., special examiner." Do you recognize that?

A. Yes, sir; I do. It is in the handwriting of Ed. Hicks.

Q. 37. All of these letters that I have shown you were written by Mr. Hicks, under directions from you, were they, Mr. Watters?

A. In a general way. I can't say that I directed him exactly what to say; but if he helped me with the reconcilement, he would put down what was necessary; and if he checked the entire account by himself, he sent this off without consulting me at that time.

233 Q. 38. Do you recollect whether you assisted in making the reconcilement sheet for the month of April? Please look at the book before you and see whether or not you did assist in making the reconcilement for the months of April, May and June, or any of them?

A. From the books there is nothing that would tell me that I have assisted, excepting the check-mark; and, as I stated before, these check-marks are like the ones I generally make; but whether they are mine I cannot possibly state.

Q. 39. Mr. Watters, do you mean us to understand that you, as a book-keeper, seeing an account rendered by one bank to another in which the bank rendering the account credits the bank to whom the account is rendered with three hundred thousand dollars ($300,000.00), a loan from the rendering bank to the other bank, that you would assume that that did not mean a loan, and that it was not the intention to charge a loan?

Question objected to by counsel for defendant on the ground that it assumes to be true what is not the fact.

A. I don't think the question is put just right——

Question withdrawn and changed to:

Q. 40. Mr. Watters, supposing that you had no previous knowledge of the transactions between the Chemical national bank and the Fidelity national bank, or the officers of the Fidelity, or directions that they had given to their employés, do you mean to tell us that if you were shown such an account as appears in "Watters Exhibit No. 10," being an account in which the Fidelity national bank is debtor and the Chemical national bank is creditor, and upon the credit side of the account there appears the item "tem. loan, $300,000.00," that you, as a book-keeper, would understand that to mean anything else than that the Chemical national bank was crediting itself with having made a loan of that sum to the Fidelity national bank?

(Mr. Herron leaves at this point to take the train for Columbus.)

A. In checking up the March account between the Fidelity national bank and the Chemical national bank, it would be necessary for me to have a complete record of what the Fidelity books were, and the account current of the Chemical national bank; and if I came across, on the debit side of the Fidelity, an item reading "transfer of funds," and on the Chemical national bank account an item reading "tem. loan," I would be all at sea. I wouldn't know what it meant; whether it had been an individual loan to

one of the directors, or a loan to the bank, or as the explana-
234 tion says in the Fidelity books, "transfer of funds," that somebody interested had transferred over to the Chemical for the credit of the Fidelity a certain sum of money. No book-keeper could come to an understanding by having both explanations before him, what the exact meaning of the entry was.

Q. 41. You haven't answered my question, Mr. Watters. My question was: Supposing that you had no knowledge of the entries as they stood upon the books of the Fidelity national bank, or as to direction given by the officers of the Fidelity national bank to their clerks—but you were simply shown that account which is now in your hands—whether it could make more than one impression upon you, as a book-keeper, as to its meaning?

A. I misunderstood your other question, was the reason I answered as I did. Well, if this account was shown me, as a book-keeper, and I would find and read here the words "tem. loan $300,000.00," and I had no previous knowledge—the large amount would naturally indicate to me that a loan had been made by the Chemical national bank; but whether to the Fidelity national bank, or to one of its directors—that I could not tell from the explanation here.

Q. 42. Mr. Watters, if the loan had not been made to the Fidelity national bank, if it had been made to some person else, why should it be charged as a loan to the Fidelity national bank?

A. That could be very easy. If, for instance, one of the members of the Fidelity, or if some one outside of the Fidelity, not a director, should borrow from the Chemical national bank, and say to them, "Be kind enough to place to my credit in your bank for my use in the Fidelity national bank," a similar entry would have been made to this, but the exact explanation as down here would not be as we have it on this paper.

I think I can make that more clear. Say, for instance, a member of the Fidelity national bank would borrow, individually, from the Chemical national bank, and state in his letter of instruction to place to the credit of the Fidelity national bank the sum that he had borrowed, the same entry would have been made.

Q. 43. The transaction which you suggest, if I understand you, Mr. Watters, is this: That an individual would borrow from the Chemical national bank a certain sum of money, and instruct the Chemical national bank to place that sum to the credit of the Fidelity national bank?

A. Yes, sir.

Q. 44. Now, do I understand you to say that it would be
235 proper book-keeping for the Chemical national bank, in such instance, in rendering its account to the Fidelity national bank, to note such a credit as if it were a loan directly from the Chemical national bank to the Fidelity national bank?

A. No, sir; I say that the entry would be the same. The explanation would have been different.

Q. 45. Well, Mr. Watters, when it appears on the account rendered by the Chemical national bank to the Fidelity national bank as a

"tem. loan," does not that signify necessarily a temporary loan from the Chemical national bank to the Fidelity national bank?

A. Yes, sir.

Q. 46. Are you not mistaken, then, in saying that such an entry as that would be made if the loan was not to the Fidelity national bank?

A. Well, as I explained, the difference would be in the explanation. The entry would be the same.

Q. 47. You mean that the figures would be the same, but not the same marginal note?

A. No, sir; I don't say that, either.

Q. 48. You mean, then, that the same amount of dollars would be placed in the same column?

A. Yes; and the same transaction would be gone through, except the explanation would be different.

Q. 49. And the difference in the explanation is in these words, "tem. loan"?

A. Yes; for instance, if I borrowed it individually, it would be "tem. loan. Watters."

Q. 50. But as it stands it signifies a loan by the Chemical national bank to the Fidelity national bank and nothing else, does it not?

A. Yes, sir.

Q. 51. Mr. Watters, you have stated that you made no statements at any time prior to the failure of the Fidelity national bank regarding this entry, to Mr. Harper or any of the other directors of the Fidelity national bank, if I understand you, regarding this particular entry of "tem. loan, $300,000.00" on the March account.

A. No, sir; I know that I did not.

Q. 52. Were you in the habit of making communications to any of the directors, aside from Mr. Harper?

A. No, sir.

Q. 53. Mr. Watters, who was the managing officer of the Fidelity national bank?

A. Edward L. Harper.

Q. 54. Who controlled all the affairs of the Fidelity national bank?

A. Mr. Harper.

236 Q. 55. Did any of the other officers attempt to supervise Mr. Harper's actions?

A. Not to my knowledge.

Q. 56. If they had done so, were you in a position to have observed it?

A. No, sir.

Q. 57. What was your position?

A. I was general book-keeper.

Q. 58. And as general book-keeper, what were your duties, Mr. Watters?

A. Keeping the bank accounts and reconciling accounts, and assisting at desks where my services were necessary——

Q. 59. Sort of a general utility man?

A. Yes, sir.

Q. 60. Mr. Watters, can you tell us whether the other directors permitted Mr. Harper to run the Fidelity national bank in the manner in which he thought best for its interests—or in the manner he thought best?

A. I believe they did. Although I have heard of some controversy between him and Mr. Kineon, I think it was at one time; and, also of some controversy between him and Mr. Alter, I believe.

Q. 61. The controversy between him and Mr. Kineon—do you recollect when that was—when that occurred?

A. I think that was in May, 1887.

Q. 62. Just shortly before the bank's failure?

A. Yes, sir.

Q. 63. And resulted in Mr. Kineon's leaving the directory of the bank, didn't it?

A. Yes, to the best of my knowledge, it did.

At this point of the taking of further testimony was adjourned to Monday morning, February 10, at 10 o'clock.

MONDAY MORNING, *February* 10, 1896.

Met pursuant to adjournment, but no testimony taken, and further adjourned to February 24th.

MONDAY MORNING, *February 24th*, 1896.

Met pursuant to adjournment, no testimony was taken and further adjourned to May 4th, 1896.

MONDAY MORNING, *May 4th*, 1896.

Met pursuant to adjournment, in room 310 Government building.

237 Before Effie V. Ryan, special examiner.

Present: Honorable William Worthington, on behalf of plaintiff.

Present: Honorable John W. Herron, on behalf of defendant.

JAMES H. MATTHEWS, called on behalf of defendant, being first duly sworn, testified as follows:

Direct examination by Mr. HERRON:

Q. 1. Mr. Matthews, state what, if any, relation you had to the Fidelity National Bank of Cincinnati, during the year 1887?

A. I was a director of the bank during 1887.

Q. 2. State what knowledge you had, at any time, of a pretended loan of three hundred thousand ($300,000.00) dollars by the Chemical National Bank of New York to the Fidelity National Bank of Cincinnati, made in February, 1887?

A. I do not remember that it ever came under my notice during a meeting of the board of directors.

Q. 3. When did you first hear of it?

A. I think after the failure; during the court proceedings.

Cross-examination by Judge WORTHINGTON:

Q. 1. Mr. Matthews, did you state when you first became a member of the board of directors of the Fidelity national bank?

A. No, sir; I did not state.

Q. 2. Do you know how many meetings of the board of directors you attended, Mr. Matthews?

A. I am not able to say Judge. You will have to depend upon the record for that; but I attended quite a number. I don't think I missed any—or, probably, not more than one during the time I was a director.

Q. 3. Mr. Matthews, you said something a little while ago, off the record—which did not go down in the stenographic report—something about your directorship being nominal. Will you just explain what you meant by that?

A. Yes, sir. It was understood between Mr. Harper and me—and I think the same is true as to Mr. Gahr—that we were to be directors only until others were found to take our places; and, in explanation, I will say that at one time Mr. Harper told us that one of us would have to step out—that one of us would have to
238 resign—as directors, to allow somebody else to supply the place; and I know Mr. Gahr and I tossed coppers to see which of us would withdraw.

Q. 4. By "Mr. Harper" you mean Edward L. Harper, the vice-president of the Fidelity national bank, do you, Mr. Matthews?

A. Yes, sir.

Q. 5. What relation to you was E. L. Harper?

A. He married a sister of mine.

Q. 6. The stock in the Fidelity national bank, Mr. Matthews, which stood in your name, did it belong to you, in fact?

A. There were ten shares that Mr. Harper gave me; the balance belonged to him.

Q. 7. The ten shares qualifying you as a director, then, he made you a present of?

A. Yes, sir.

Q. 8. Do you recollect when was the first meeting of the board of directors that you attended, Mr. Matthews?

A. No, sir; I do not recollect that.

Q. 9. Do you recollect about when, with reference to the failure of the Fidelity national bank, for example?

A. No, I could not even approximate it. My memory has failed to retain those dates, Judge.

Q. 10. Then you could not tell us whether or not you attended any meeting of the board of directors prior to—say the twentieth of February, 1887, before the failure of the bank?

A. I am under the impression that I did.

Q. 11. Do you recollect testifying in the case that was brought against the directors of the Fidelity national bank, Mr. Matthews—the case brought by Mr. Armstrong, receiver of the Fidelity national bank *vs.* Briggs Swift and others, directors of the Fidelity, in which Miss Ryan was the special examiner, and took the testimony?

A. Yes; I believe I do.

Q. 12. Do you recollect, at that time, stating that you only attended three or four meetings of the board of directors?

A. No, sir; I do not recollect that; but my answer at that time is probably truer than I could answer now.

Q. 13. Mr. Matthews, I will call your attention to a passage from your testimony in that case, which appears at page 496 of the printed record in that case your evidence beginning on page 480. I will ask you if you are the same James H. Matthews who appears to have been there sworn and testified?

A. Yes, sir.

239 Q. 14. Now, I will ask you—on page 496, of that record appears the following: "Q. Had you ever any conversation with Mr. Harper on the subject of your becoming or being or continuing a director? A. Mr. Harper told me when I was put in there that it would be only for a time."

A. That is right; yes, sir.

Question continued: "Q. Do you remember when that was? A. No, sir; at one time I resigned, to make room for another party."

A. That's true.

Question continued: "Q. For whom? A. I don't remember now. Q. How often were you at the directors' meetings? A. I think I was there about three or four times."

Now, Mr. Matthews, do you recollect—does that refresh your memory at all as to how many times you attended the directors' meetings?

A. I think that is more likely to be correct than any answer I could give now. I ought to have referred to the minutes of the meetings of the board of directors, in order to say positively.

Q. 15. Now, Mr. Matthews, all that I understand you to say with reference to this matter of the loan of three hundred thousand dollars ($300,000.00), in February, 1887, is that it was not mentioned at any meeting of the board of directors at which you were present?

A. I have no recollection of it ever coming up at any meeting of the board of directors at which I was present.

Q. 16. Was the subject of the manner of the management of the bank by Mr. Harper ever discussed at the meetings of the board of directors when you were present, Mr. Matthews?

A. I recall one instance, particularly, at which Mr. Kineon sold his stock—I was present at that meeting.

Q. 17 That was in May, was it, shortly before the bank failed?

A. Yes; that was shortly before the bank failed.

Q. 18. And that was the occasion on which Mr. Kineon was trying to see the discount book—to see the discounts?

A. He wanted to have a committee appointed to examine the discounts is my recollection of it.

Q. 19. And Mr. Harper objected?

A. He said that there was already a committee.

Q. 20. That is the only occasion which you remember?

A. That is the only distinct recollection I have of any controversy at the meetings——

Q. 21. Well, Mr. Matthews, I am not speaking of contro-
240 versy, but of discussion as to what loans were made, and to whom they were made, or what proceedings were taken, and as to running the bank, etc.?

A. That is all I can recall in regard to that.

Q. 22. Mr. Harper was the executive officer of the bank and in control of it, was he not?

A. I believe so. All my dealings were through him.

Q. 23. You represented Swift's iron and steel works at that time?

A. Yes, sir.

Q. 24. And for that company had large dealings with the bank?

A. Yes, sir.

Q. 25. And they were all with Mr. Harper, you say?

A. Yes; I did not go to Mr. Harper, you say?

A. Well, I did not go to Mr. Harper each time there was anything to be done, but I knew that he had given instructions—I knew that instructions had to be given, to take charge of my affairs, as I endeavored to put them through.

Q. 26. Do you know that he gave instructions to that effect?

A. I know that there was no opposition to them going through.

Q. 27. Whatever banking business you had to do, in the way of having instructions given, in order to have your affairs go through, as you say, was through Mr. Harper?

A. Yes, sir.

Q. 28. Were the instructions that Mr. Harper gave with reference to such matters ever discussed in the meetings of the board of directors of the bank?

A. Not in my presence, no sir.

Q. 29. Mr. Matthews, what were the matters which you applied to Mr. Harper to give instructions about?

A. On the subject of discounts, I think, was the principal one; and, probably, the carrying of those checks.

Q. 30. What do you mean, Mr. Matthews, by "the carrying of those checks"?

A. They held some of the checks of the Swift's iron & steel works in the cash, from one day to another.

Q. 31. Do you recollect how long the Fidelity national bank had been in the practice of doing that, how long before its failure?

A. No, sir; I could not tell you how long—but through a period of time.

Q. 32. Well, I want to get at whether it was a matter of one month before the failure, or six months before?

A. I think it was longer than one month; but I would not
241 say that it was six months—I would not like to say it was six months, from my memory; but it might have been that.

Q. 33. Was that all the time, Mr. Matthews, or did it occur during the whole period that you were a director?

A. I don't believe that it was necessary during all that period—no, sir.

Q. 34. Do you recollect what was the gross amount, in dollars, of

the checks that were thus held over as cash, Mr. Mathews? I do not mean for each day, but I mean on an average?

A. I think that they very frequently reached from sixty to seventy thousand ($60,000.00 to $70.000.00) dollars.

Q. 35. Did they not exceed that greatly?

A. Some days, I expect, they did.

Q. 36. Didn't they come up as high as four hundred thousand ($400,000.00) dollars, Mr. Matthews?

A. In one day?

Q. 37. Yes; in one day.

A. No, sir; I don't remember that they did. I know that there was a loan account, and those checks were carried. I expect they aggregated about that amount.

Q. 38. Did you ever hold over checks in any other bank besides the Fidelity, Mr. Mathews, checks of Swift's iron & steel works?

A. I believe not: no, sir.

Q. 39. Now, Mr. Mathews, I will call your attention to page 494 of the printed record in the directors' case, and ask you to look over the testimony there given by you, and see if that refreshes your memory at all on this subject?

A. (After reading the testimony referred to.) This refers to the 18th of June, in which I said that according to our books, there was about four hundred thousand dollars of checks of the Swift's iron & steel works.

Q. 40. Yes. Well, read on down the page.

A. (After doing so.) Well, I will try to answer your question now, Judge.

Q. 41. Now, as to the amount of checks, in dollars, that were held over as cash by the Fidelity national bank, without depositing them for collection, and as to the period of time during which this continued—if your memory is refreshed by having read over your former testimony on this subject?

A. After refreshing my memory, I believe that the amount was, approximately, four hundred and fifteen thousand ($415,000) dollars, the latter part of June, 1887.

Q. 42. And as to the period of time during which this business had been continued?

242 A. I can only go by my former testimony; three or four months, it says there in the printed record.

Q. 43. I will call your attention to a question and answer on page 495 of the printed record, the previous examination having been as to the arrangement had with Mr. Harper for holding these over. "Now, leaving that, for how long a time had the checks of the Swift's iron & steel works been deposited with the Fidelity national bank, and the Swift's iron & steel works got credit at the bank, and drawn money on, and for those checks which came under that agreement or arrangement between yourself and E. L. Harper?"

"A. For several months—I don't know just how long."

Do you recollect having given that testimony, Mr. Mathews, at that time?

A. Yes, I believe that testimony is correct.

Q. 44. Do you recollect how long a period of time that "several months" covered?

A. No, sir; I have nothing to guide me in fixing that.

Q. 45. Now, all of that business was done by Mr. Harper, I understand you, without consulting with any other of the members of the board of directors—the business of instructing the subordinates to carry, as cash, checks of the Swift's iron & steel works to the amounts which you chose to leave there for that purpose?

A. Yes, I think all the instructions came from Mr. Harper. I know I gave no instructions.

Q. 46. It was not a matter about which Mr. Harper consulted the board of directors?

A. Not in my presence, no.

Q. 47. So far as your knowledge goes?

A. No, sir.

Q. 48. Prior to the time at which Mr. Kineon sold out his stock, was there ever any discussion in a meeting of the board of directors as to what loans or discounts should be made and as to an examination of them? What I want to get at, and possibly I ask it in a shorter way, is whether the board of directors themselves discussed the policy of the bank in making loans, and gave directions to Mr. Harper, or whether they trusted Mr. Harper to manage the bank in such a manner as he thought was most conducive to the interests of the stockholders?

Question objected to by counsel for defendant.

A. I remember several instances which I cannot now detail, where questions came up for discussion in the board of directors of, probably, minor matters, for instance, extending lines of credit to other parties, etc. But I am under the impression that most of the business of the bank was done by Mr. Harper direct; as I did not hear much of that.

243 At this point an adjournment was had until Tuesday morning, May 5th, 1896.

TUESDAY MORNING, *May 5th*, 1896.

Met pursuant to adjournment, at the office of Hon. John W. Herron, United Bank building, Cincinnati, Ohio.

Present, Hon. John H. Herron, on behalf of defendant.

And also, HENRY POGUE, called on behalf of defendant, being first duly sworn, testified as follows:

Direct examination by Mr. HERRON:

Q. 1. State your name, residence and occupation?

A. Henry Pogue, Cincinnati; merchant.

Q. 2 Mr. Pogue, state what connection, if any, you had with the Fidelity National Bank of Cincinnati, during the years 1886 and 1887?

A. I was a director of the bank during that time.

Q. 3. During the entire time?

A. Yes, from the organization of the bank until within a few days of its close.

Q. 4. Were you an active director, Mr. Pogue, during the whole time?

A. Well, yes; I suppose all the directors are supposed to be active; we all took an active interest in the affairs of the bank.

Q. 5. Mr. Pogue, state what knowledge you had of a pretended loan of three hundred thousand ($300,000.00) dollars made by the Chemical National Bank of New York to the Fidelity National Bank of Cincinnati, in February, 1887?

A. I had no knowledge whatever.

Q. 6. When, if at all, did you ever hear that any such loan was claimed to have been made?

A. After the failure of the Fidelity national bank only, and through reports in the newspapers.

Judge Worthington, counsel for plaintiff, not having come in, an adjournment was had to Wednesday morning, May 6th, 1896.

WEDNESDAY MORNING, *May 6th.*

Met pursuant to adjournment, at the office of Henry Pogue, Esq.

244 Present, Judge Worthington, on behalf of plaintiff.

Cross-examination by Judge WORTHINGTON:

Q. 1. Mr. Pogue, who was the active executive officer of the Fidelity national bank?

A. The president was Briggs Swift; the vice-president was E. L. Harper, and Ammi Baldwin was the cashier.

Q. 2. Did any of the officers report at the meetings of the board of directors which you attended, the loans and discounts which had been made by the bank—I do not mean in gross, but I mean in particular—the loans and discounts?

A. No, sir, they did not.

Q. 4. Mr. Pogue, do you know which one of the officers you have mentioned had charge of that department of the business of the bank?

A. I think there was a committee; Mr. Harper was one of the committee who had charge of the loan account; the committee was composed of the active officers of the bank.

Q. 5. What, Mr. Pogue, was it that the board of directors—or the members of the board of directors—did with reference to their activity, in managing the bank?

A. The management—the directors did not manage it; the bank was managed by a board of officers; but the board of directors met and had reports from the officers of the bank at stated times—I think it was every month—at regular monthly meetings.

Q. 6. Those reports, Mr. Pogue, were they spread on the minutes?

A. Whatever reports were made were spread upon the minutes, yes.

Q. 7. And excepting receiving those reports, the directors took no part in the control or management of the bank?

A. Excepting there was some special business.

Q. 8. What I want to know, Mr. Pogue, is whether or not the directors exercised an active supervision of the business of the bank and what the officers are doing, or whether they trusted those officers to perform their duties—their business?

A. Well, I don't really know how to answer that question. They have been called up before a meeting of the board of directors in a matter of loans, or discounts, and have been required or requested to exhibit the loan account to the directors.

245 Q. 9. Is the request to which you refer, Mr. Pogue, the one made by Mr. Kineon.

A. Yes. I don't know of any other case in which they were called up for an investigation for what they did in reference to that matter.

Q. 10. With that one exception, then, the directors left the matter of business, the management of the bank——

A. To the board of officers; yes.

Q. 11. As a matter of fact, Mr. Pogue, Mr. Harper was the active member of that board of officers, was he not?

A. Well, possibly, he was; but Mr. Swift was there every day to my knowledge, excepting when he was out of the city on a short vacation, and his vacations were always short; I never knew him to be away for any great length of time.

Q. 12. I do not mean whether he was present at the bank, but who was the active managing man in the bank?

A. Possibly, Mr. Harper was the managing man.

Q. 13. You have said, Mr. Pogue, that you did not know of this loan that was made by the Chemical national bank to the Fidelity national bank until after the failure?

A. No, sir; I knew nothing whatever about it until after the failure of the Fidelity.

Q. 14. Did you know before the failure as to any instructions which Mr. Harper had given to the receiving tellers to hold out of the clearing-house, and count as cash, checks which had been left with the bank?

A. No; I did not know anything of that matter at all.

Q. 15. Did you know anything about the other so-called cash items which were held cash?

A. No, sir; nothing at all, until after the failure.

Q. 16. Did you find out afterwards that there had been transactions of that kind, Mr. Pogue?

A. Only from reports in the newspapers.

Q. 17. The board of directors had never examined into the cash account, to see how the cash actually in the hands of the bank compared with it as it appeared on the books of the bank?

A. Not without the bank examiner examined those items.

Q. 18. You are the same Mr. Pogue who was a defendant in the suit brought after the failure of the Fidelity national bank, by David Armstrong, receiver of the Fidelity, against Briggs Swift and

others, the directors of that bank, to recover from them for negligence and misfeasance in the performance of their duties?

A. Yes; I was a director.

Q. 19. Has that case been settled, so far as you are concerned?

246 A. Yes, sir.

Q. 20. How was it settled—by dismissal or by compromise, Mr. Pogue?

A. It was compromised.

Tuesday afternoon, May fifth, at the office of Mr. Herron.
Present, Mr. Herron, on behalf of the defendant.

And, also, SOLOMON P. KINEON, who was previously sworn in this case, recalled on behalf of the defendant, testified as follows:

Direct examination by —— ——:

Q. State what connection, if any, you had with the Fidelity national bank during the year- 1886 and 1887?

A. I was a director.

Q. Up to what time in 1887 was you a director?

A. I cannot tell you the date, Mr. Herron; I think it was until about two or three months before the failure.

Q. State what knowledge, if any, you had of a loan having been made, or claimed to have been made, by the Chemical National Bank of New York to the Fidelity National Bank of Cincinnati, of three hundred thousand dollars ($300,000.00), in February, 1887.

A. I never knew anything about it—never heard of it.

Q. State whether you had any knowledge, while you were a director, at any time, of the Chemical national bank having loaned any money to the Fidelity national bank?

A. No, sir; I had not.

Q. When did you first hear of any such loan having been claimed to be made?

A. Well, I guess after Armstrong took hold; after the failure—was the first I heard of it.

Adjourned to Wednesday morning, May 6th, 1896.

CINCINNATI, *February* 25, 1886.

Pursuant to a call the directors met at the banking-house.

Present: Messrs. E. L. Harper, W. H. Chatfield, H. B.
247 Morehead, Franklin Alter, Sol. P. Kineon and A. P. Gahr, Mr. E. L. Harper acting as chairman and Mr. Gahr as temporary chairman.

The resignation of Mr. J. H. Mathews, as a director of this bank, was read, and upon motion accepted. Mr. H. B. Morehead nominated Mr. Henry Pogue as director to fill the vacancy caused by resignation of Mr. Mathews, and upon motion Mr. Henry Pogue was unanimously elected a director, and immediately qualified and took his seat.

Upon motion of Mr. Franklin Alter, seconded by Mr. Kineon,

Mr. Ammi Baldwin was unanimously elected cashier of this bank, and upon motion of Mr. Chatfield, seconded by Mr. Alter, Mr. Benjamin E. Hopkins was elected assistant cashier of this bank unanimously.

Thereupon an adjournment was moved, which motion was duly carried.

A. P. GAHR,
Temporary Secretary.

E. L. HARPER,
Vice-President.

An excellent record.

R. C. P.,
U. S. N. Bk. Ex.

March 12, '86.

"EXHIBIT MINUTES" TO W. B. MCCAULSEN'S TESTIMONY.

CINCINNATI, *May* 6, 1886.

Pursuant to call of the president the directors met this day at the bank.

Present, Messrs. Swift, Harper, Chatfield, Alter, Pogue, Kineon, Morehead and Gahr. Mr. Swift in the chair, and Mr. Gahr acting as temporary secretary.

Upon motion the minutes of the last meeting were read and approved. It was moved and seconded that the chairman appoint a committee of three of the directors to draft and submit a form of by-laws as soon as practicable, which motion was duly carried, and Messrs. Harper, Chatfield and Morehead were appointed to act as such committee.

The question of fixing the salary of Mr. Baldwin as cashier was presented, and Mr. Chatfield moved that the amount of Mr. Baldwin's salary be fixed at $300.00 per month. Motion seconded by Mr. Pogue and carried unanimously.

Mr. Harper moved that as a matter of history, for possible future reference, with the consent of the board a statement of the
248 business of the opening day, and also a statement of the business at the close of this day be incorporated in the minutes, and this motion being duly seconded, and put to vote, was carried unanimously.

In accordance with the resolution above adopted the following statements are included herein:

Opening Day Business, March 1, 1886.

Resources, loans and discounts	$201,915 99
U. S. bonds to secure circulation	50,000 00
U. S. bonds on hand	2,500 00
Other stocks, bonds and mortgages	6,500 00
Due from approved reserve agents	320,785 56
Due from other national banks	153,868 33

Due from State banks and bankers	9,293 86
Real estate, furniture and fixtures	9,500 00
Current expenses and taxes paid	25 50
Premiums paid	15,236 14
Checks and other cash items	45,311 33
Exchanges for clearing-house	431,764 00
Bills of other banks	152,518 00
Fractional paper currency, nickels and pennies	25 50
Specie	16,322 50
Legal tender notes	187,200 00
Total	$1,602,766 71

Liabilities.

Capital stock paid in	$581,000 00
Individual deposits	875,157 27
Certificates of deposit	100 00
Due to other national banks	114,776 33
Due State banks and other banks and bankers	31,733 11
Total	$1,602,766 71

Statement of business at the close—May 6, 1886.

Resources.

Loans and discounts	$1,967,966 40
U. S. bonds to secure circulation	100,000 00
U. S. bonds and stocks on hand	6,900 00
Due from approved reserve agents	114,892 70
Due from other national banks	62,720 17
249 Due from State banks and bankers	37,800 97
Real estate, furniture and fixtures	11,181 30
Current expenses and taxes paid	10,672 27
Premiums paid	26,400 00
Cash	459,194 34
Total	$2,800,258 15

Liabilities.

Capital stock	$1,000,000 00
Undivided profits	29,951 41
Circulation	70,000 00
Individual deposits	1,047,666 09
Certificates of deposit	20,858 48
National banks	528,429 49
Other banks and bankers	103,352 68
Total	$2,800,258 15

There being no further business before the board an adjournment was moved, which was duly seconded and carried.

BRIGGS SWIFT, *Pt.*

A. P. GAHR, *Temp. Sec'y.*

Report of the Committee on By-laws.

On conformity with a resolution passed at the last regular meeting appointing a committee composed of Messrs. Harper, Chatfield and Morehead—

Your committee have hereunto drafted and present the following as their unanimous selection, for your honorable approval.

Respectfully, E. L. HARPER, *Chairman.*

By-laws.

The Fidelity National Bank of Cincinnati, Ohio.

Elections.

The regular annual meeting of the stockholders of the bank
250 for the election of directors shall be held at the banking-house on the second Tuesday in January of each year, between the hours of eleven and one o'clock, and not less than fifteen days' notice of the time and object of the meeting shall be given by advertisement in the daily papers or by notice mailed to each stockholder of record.

It shall be the duty of the board of directors previous to the time of said election, to appoint three stockholders to be judges of said election, who shall hold and conduct the same, and who shall, after the election has been held, notify the cashier or president in writing of the result thereof, and the name- of the directors-elect.

2nd. The cashier or president, upon receiving the returns of the judges of elections as before provided, shall cause the same to be recorded upon the minute book of the bank, and shall notify the directors elected of their election, and of the time and place at which they are required to meet for the purpose of organizing the new board. If, at such time, there should not be a quorum in attendance, the members may adjourn from time to time until a quorum is secured, and no business shall be transacted prior to qualifying, by taking the oath of office as prescribed by law.

3rd. If, for any cause, the annual election for directors should not be held on the date fixed for same in the articles of association, the directors in office shall order an election to be held on some other day, of which special election notice shall be given as provided by law, and judges appointed, returns made and recorded and the directors-elect notified in accordance with sections 1 and 2 of these by-laws.

Officers.

SEC. A. The officers of this bank shall be a president, vice-president, cashier, assistant cashier and such other officers as may in the judgment of the board of directors be from time to time required.

SECTION 5. The president and vice-president shall hold their offices for the current year, for which the board of directors, of

which they shall be members, was elected; unless they shall resign, become disqualified or be removed, and any vacancy occurring in the offices of president or vice-president, or in the board of directors shall be filled by the remaining members of the board.

SEC. 6. The cashier and subordinate officers shall be appointed respectively to hold their offices during the pleasure of the
251 board, and any officer, director or employé may be removed from office at any time by the votes of five members of the board of directors.

SEC. 7. The cashier of this bank shall be responsible for all the moneys, funds and valuables of the bank, and shall account for and deliver the same to the order of the board of directors, or to such person or persons as they may authorize to receive the same.

SEC. 8. The president and vice-president shall be responsible for all such sums of money and property of every kind as may be entrusted to their care, or placed in their hands by the board of directors, or by the cashier, or otherwise, and deliver the same to the board of directors, or to such person as they may authorize to receive the same.

SEC. 9. All transfers and conveyances of real estate shall be made by the bank in accordance with the orders of the board of directors, and shall be signed by the president or vice-president and cashier, and be under the corporate seal of the bank heretofore adopted.

SEC. 10. When any regular meeting of the board falls upon a holiday, the meeting shall be held upon such other day as the board may previously designate.

SEC. 11. The regular meeting of the board shall be held on the second Tuesday of each month, at 3 p. m. Special meetings may be called by the president, vice-president or cashier, or at the request of three or more directors, and should there be no quorum at any regular or special meeting, the members present may adjourn from day to day until a quorum is secured; any meeting may be adjourned by a vote of a majority of a quorum, but in the absence of a quorum no business shall be transacted.

SEC. 12. The organization papers, the returns of all elections, the proceedings of all meetings of the board, the by-laws and all amendments shall all be recorded in the minute book and the minutes of each meeting shall be kept by the cashier, who shall be the secretary of the board, and signed by him and attested by the president or vice-president.

SEC. 13. The cashier shall keep a daily record, giving a list in gross of the discount of each day, which shall be open to the inspection of the board at any time.

SEC. 14. The stock of this bank shall be assignable and transferable only upon its books, subject to the provisions and restrictions of the banking laws; and a transfer book shall be provided in which all assignments and transfers of its stock shall be made.

252 SEC. 15. Transfers of stock shall not be suspended pending the declaration of dividends; and unless an agreement to the contrary shall be expressed in the assignments of stock dividends thereon shall be paid to the party in whose name the stock shall

stand upon the books of the bank, at the date of the declaration of such dividend.

SEC. 16. Certificates of stock shall be signed by the president, or vice-president and cashier and issued to stockholders; and such certificates shall state upon their face that the stock is transferable only upon the books of the bank and when stock is transferable, the stock shall be returned to the bank, and canceled by it and new certificates issued in lieu thereof.

SEC. 17. The president, vice-president and cashier shall have the power to discount and purchase bills, notes and other evidences of debts and to buy and sell bills of exchange.

SEC. 18. All contracts, drafts and checks and all receipts from circulating notes received from the comptroller, shall be signed by the president, vice-president or cashier.

SEC. 19. The directors shall have power to change the form of the books or accounts, whenever deemed expedient by them, and define the manner generally in which the bank's affairs shall be conducted.

SEC. 20. A majority of the board of directors, including the president or vice-president, or either of them, shall be a quorum to transact business.

SEC. 21. These by-laws may be changed or amended in the discretion of the board of directors by a vote of two-thirds of the members thereof.

SEC. 22. No memorandum checks, call loans or other evidences of debt, which should properly belong to the bills-receivable account, shall be considered as cash in the books of the bank; but all such evidences of indebtedness shall appear and be recorded as bills receivable, or call loans in the book or books, provided for such record.

CINCINNATI, *August* 2, 1886.

Special meeting, called by order of the president.

Members present: Messrs. Swift, Harper, Kineon, Morehead and Gahr.

The minutes of the last meeting were read and approved.

253 The report of the committee on by-laws *were* read and approved. The report of the committee on by-laws was then offered—the same being engrossed upon this minute book, and read, and before action was taken thereon, Mr. Morehead offered the following to be included as section No. 22, viz:

Special meeting—Continued.

AUG. 2, 1886.

"No memorandum checks, call loans or other evidences of debt which should properly belong to the bills-receivable account, shall be carried as cash in the books of the bank, but all such evidences of indebtedness shall appear and be recorded as bills receivable or call loans on the book or books provided for such record."

Upon motion by Mr. Morehead, seconded by Mr. Kineon, it was

resolved, that the report be received and that the by-laws as amended be adopted. Carried.

On motion, adjourned.

AMMI BALDWIN,
Cashier & Secretary.

CINCINNATI, *August* 10, 1886.

Regular meeting of which all members were duly notified.

The members present were Messrs. Harper, Kineon and Gahr.

There not being a quorum present it was decided by resolution to adjourn.

AMMI BALDWIN,
Cashier & Secretary.

CINCINNATI, *Sept.* 14, 1886.

Regular meeting.

The members in attendance were Messrs. Swift, Harper and Alter.

There not being a quorum present the meeting was adjourned without further action.

AMMI BALDWIN,
Cashier & Secretary.

CINCINNATI, *Oct.* 12, 1886.

Regular meeting.

Only members in attendance were E. L. Harper and A. P. Gah-, being not a quorum present of members the meeting adjourned.

AMMI BALDWIN,
Cashier & Secretary.

254 CINCINNATI, *Nov.* 9, 1886.

Regular meeting.

Members present were Briggs Swift, E. L. Harper, A. P. Gahr, S. P. Kineon and there being no quorum present, the meeting adjourned.

AMMI BALDWIN,
Cashier & Secretary.

CINCINNATI, *Dec.* 14, 1886.

Regular meeting.

The only members appearing being W. H. Chatfield, A. P. Gahr, E. L. Harper and no quorum present the meeting adjourned.

AMMI BALDWIN,
Cashier & Secretary.

CINCINNATI, *December* 24, 1886.

Called meeting.

Members present: Messrs. Swift, Harper, Kineon, Chatfield, Gahr and Alter.

The minutes of meetings, Aug. 2d, Aug. 10th, Sept. 14th, Oct. 12th, Nov. 9th, Dec. 14th, were read and approved. The president offered the following report of the condition of the bank to the present date, viz:

Statement of Resources and Liabilities of the Fidelity National Bank, Ending December 23, 1886.

Resources:

Call loans	$435,399 50
Domestic bills	1,436,669 93
Foreign bills	852,005 60
U. S. bonds to secure circulation	100,000 00
Premium on U. S. bonds to secure circ'lat'n	26,400 00
5 per cent. redemption fund	4,320 86
U. S. bonds on hand	1,550 00
Stocks and bonds on hand	12,200 00
Exchange	288 82
Furniture and fixtures	11,746 90
Stationary, stamps, etc	5,567 74
Expenses	39,163 18
Profit and loss	203 75
Protest fee account	15 90
Funds in transit	89,280 38
Reserve in N. York Chemical nat. bank	227,692 98
Reserve in N. York Nat. Broadway bank	78,958 26
Cash in hand	641,206 53
	$3,962,670 33

255 Liabilities:

Capital stock	$1,000,000 00
Individual deposits	1,144,490 46
Certificates of deposit	18,347 34
Due national banks	1,108,008 04
Due banks and bankers	493,981 22
Cashiers' checks outstanding	486 10
Circulation	90,000 00
Interest accrued	107,357 17
	$3,962,670 33

Profits to Date.

Interest accrued and interest estimated, C., L. & C.		$117,357 17
Expenses	$39,163 18	
Profit and loss	203 75 less	39,366 93
Net profits		$77,990 24

Called meeting, Dec. 24, 1886—Continued.

On motion of Mr. Harper, seconded by Mr. Chatfield, it was resolved that the sum of $50,000, fifty thousand dollars, be taken from the accrued profits and placed to the credit of the surplus fund account. On motion of Mr. Kineon, seconded by Mr. Alter, it was resolved that a quarterly dividend from the net earnings of 1¾ per cent., one

and three-quarters per cent., be declared upon the capital stock of the bank to the shareholders of record, Dec. 30th, 1886, the same to be placed to the credit of each in account subject to check on and after January 3rd, 1887.

On motion, adjourned.

AMMI BALDWIN,
Cashier and Secretary.

CINCINNATI, *January* 11, 1887.

Regular meeting.

Members present: Messrs. Swift, Harper, Kineon, Chatfield, Pogue and Gahr.

The minutes of the last meeting were read and approved. The report of the stockholders' meeting and return of the judges
256 of election were then received, read and ordered placed upon the minutes, and are as follows, viz:

"At the regular annual meeting of the stockholders of the Fidelity National Bank of Cincinnati, Ohio, held at its banking-house, January 11th, 1887, without any formal motion or proposition it was agreed to proceed with the election of directors for the ensuing year, in accordance with the provision of the by-laws.

"Messrs. J. W. Wils-ire, Joseph Lohman and J. O. Whittaker, being selected as judges of the election, proceeded with the duties as required, and present the following report, viz:

"*Report.*

"CINCINNATI, *Jan'y 11th*, 1897.

"We, the judges of the election held this day for the election of directors of the Fidelity National Bank of Cincinnati, Ohio, for the ensuing year, thereby declare that there has been 6,932 shares of stock voted with the following result, viz:

"Briggs Swift, received 6,932 votes.
"E. L. Harper, received 6,932 votes.
"W. H. Chatfield, received 6,932 votes.
"Henry Pogue, received 6,932 votes.
"A. P. Gahr, received 6,932 votes.
"Sol. P. Kineon, received 6,932 votes.
"J. H. Mathews, received 6,932 votes.
"Ammi Baldwin, received 6,932 votes.
"Benj. E. Hopkins, received 6,932 votes.

"(Signed) J. W. WILSHIRE,
"JOSEPH LOHMAN,
"J. O. WHITTAKER,
"*Judges of Election.*"

It was then, upon motion, resolved to adjourn "*sine die.*"

AMMI BALDWIN,
Cashier and Secretary.

Regular meeting.

CINCINNATI *Jan'y* 11, 1887.

Regular meeting.

The newly elected board of directors, composed of the following gentlemen, namely:

Briggs Swift, E. L. Harper, W. H. Chatfield, Henry Pogue,
257 Sol. P. Kineon, A. P. Gahr, J. H. Mathews, Ammi Baldwin and Benj. E. Hopkins, being present and duly qualified, by taking the oath of office, administered by Mr. Edward Gurney, the notary public of the bank, met in session, Mr. Baldwin acting as chairman, when Mr. Briggs Swift was nominated for president, there being no other nominations, the election followed and Mr. Swift was declared unanimously elected president. Taking the chair, Mr. Swift stated that nominations were in order for vice-president.

Mr. E. L. Harper, receiving the only nomination, was then voted for and was unanimously elected vice-president.

Mr. Ammi Baldwin, being nominated for cashier, and Mr. Benj. E. Hopkins for assistant cashier, both were duly elected to fill these positions.

There being no further business, on motion, the meeting then adjourned.

AMMI BALDWIN,
Cashier and Secretary.

CINCINNATI, *Feb'y* 8, 1887.

Regular monthly meeting.

Members present: Messrs. Harper, Chatfield, Kineon, Mathews, Hopkins, Baldwin, Mr. Swift being absent, Mr. Harper took the chair.

The minutes of the last meeting were then read and approved. The chair then reported that the Treasurer of the United States, having designated this bank as a United States depository, proposing to leave a deposit of $300,000 to credit of the treasurer, it was necessary to purchase Government bonds to secure the same, and that the officers acting upon this requirement had purchased $340,000 United States 4 per cent. 1907 bonds, and had deposited them with the Treasurer of the United States, to be held in trust as security for the safe keeping and prompt payment of the public moneys deposited with the bank, and that the bonds had been purchased at the lowest available market rates.

Mr. Chatfield then offered the following resolution, which was seconded by Mr. Kineon, viz:

"Be it resolved That the board approves the action of the officers in the purchase and deposit of the $340,000 Government bonds as security for public moneys." Carried. On motion, adjourned.

AMMI BALDWIN,
Cashier and Secretary.

258 CINCINNATI, *March* 8, 1887.

Regular monthly meeting.

Members present: Messrs. Harper, Pogue, Kineon, Chatfield, Hopkins, Mathews and Baldwin.

The minutes of the last meeting were read and approved. On motion, Mr. Kineon, seconded by Mr. Pogue, it was resolved that a quarterly dividend of 1¾ per cent., one and three-quarters per cent., be declared from the net earnings, upon the capital stock, and placed to the credit in account each shareholder of record on March 31, 1887, subject to check on and after April 1st, 1887.

Unanimously carried. On motion, adjourned.

AMMI BALDWIN,
Cashier and Secretary.

CINCINNATI, *March* 26, 1887.

Called meeting.

Members present were Messrs. Swift, Harper, Chatfield, Pogue, Gahr, Mathews, Hopkins, Baldwin.

The only absent member was Mr. Kineon, although all members were duly notified of the meeting and object. The president stated that the object of the meeting was to take into consideration the increase of the capital stock; that the matter had been discussed among the members, and that they believed the proper time had arrived to make an increase, which could be done in accordance with the articles of association.

Thereupon, Mr. Chatfield offered the following motion, which was seconded by Mr. Harper:

Be it resolved, That the capital stock of the bank be increased $1,000,000, one million dollars, and that the same may be furnished to the shareholders of record of April 5, 1887, in like proportion to the amount of their holdings at the rate of $135, one hundred and thirty-five dollars, per share. Unanimously carried.

Mr. Pogue, seconded by Mr. Hopkins, then offered the following resolution:

Resolved, That a call be made in accordance with the foregoing resolution of 50 per cent. installments, the first to be paid in by 5th of April, 1887, and the second by 5th May, 1887, and that the shareholders shall be so notified from now until April 5th, by advertisements in the daily papers. Carried.

There being no further business, the meeting then, upon motion, adjourned.

AMMI BALDWIN,
Cashier and Secretary.

259 CINCINNATI, *May* 10, 1887.

Regular monthly meeting.

Members present: Messrs. Swift, Harper, Chatfield, Kineon, Mathews, Hopkins and Baldwin.

The minutes of the last two meetings were read and approved.

The president asked that the names of those having discounts for

the past month be read, which was done by the cashier. Mr. Kineon then offered a resolution that a committee of three be appointed by the chair to examine the bills receivable of the bank, which being seconded by Mr. Chatfield, the question was put and was declared carried.

The chair named Messrs. Chatfield, Pogue and Gahr as that committee. Mr. Kineon here gave his resignation as he had sold his stock and to fill the vacancy Mr. Eugene Zimmerman was nominated and was unanimously elected. No further business offering the meeting then adjourned.

AMMI BALDWIN,
Cashier & Secretary.

Report on this account ten days after receipt.

CINCINNATI, —— —, 188–.

In account with the Fidelity National Bank of Cincinnati.

Monthly Statement.

DR.		No. —.		CR.		
	We charge:				We cr.:	
3-1	46881	3 62	3-1	Cortland		35 94
	342		3-3	Fees 1.11 each		2 22
3-4	Error 342 14	86	3-21	Ret'd		67 65
	—		"	"		79 98
	462 50		3-24	Mihalovitch		31 85
3-7	Error 462	50	"	"		135 65
3-7	Letter	106,025 04	3-28	Ret'd fees		59 35
3-15	Error 3-7	100				
3-17	Letter	115,406 38		You cr.:		
3-26	Letter	78,836 95	12-12	Letter		28,500 82
3-29	Letter	68,301 29	12-17	Miles		500
3-30	Letter	58,717 71	1-11	Oneida		102 25
3-31	Coll. 112,861	31	3-2	New Atlanta		8,500
	" 51822	22 50	3-7	1st Ashville		10,000
	Canceled 12100	1,000	3-9	Letter		100,235 92
	Letter	98,704 01	3-15	Brown		2,203 40
12-10	Letter	28,599 79	"	Lamb		3,785 72
9-16	Due 7-19 T. Bq. 45	44 68	3-19	Letter 3-17		99,853 73
2-5	1st Ashville	10,000	3-25	B. W. Hitchcock		200 75
2-25	Ret'd	1 65	3-26	Van Worden		173 91
2-21		3 08	3-28	Letter 3-26		26,046 92
2-21		60,000	"	Carter		124 91
2-26	New Atlanta	10,000	3-29	N. Y. Life Ins. Co		9 43
				Wenham		14 75
	You charge:		3-30	Furlong		63 20
2-25	Ret'd	25 94		Jessetson & Co		100
3-11	Cash ret'd unpaid	1,500	3-31	Greensboro		841 31
"	" " "	2,500		Letter		66,023 19
3-16	Ret'd	89 85		Drafts outstanding		99,217 82
3-19	"	147 63		Their balance		32,675 97
3-22	"	167 50		Our balance		50,376 48
3-31	Cash	60 09		Out in Feb. account		50 50
		15		Error in checks		01

Reconcilement sheet for Chemical national bank. March, 1887.

EFFIE V. RYAN,
Special Examiner.

200

3280	100	1136	50
4073	5	97	000 00
4551	43	426	303 50
4961	200	134	000
6321	100	41	100
6959	1,000	55	00
6960	1,000	99	0,000 00
1	500	515	75
7779	100	66	324 80
8024	100	73	98 15
275	30	5	8
389	0	80	1,500
630	100	2	25
1	100	3	5
89	100	612	00

		91		100	8		25
		4		100	40		10
		5		100	704		00
		6		100	26		50
		8		100	41		50
		8752		50	2		166 66
		9149		1,000 64	53		75
		50		500	77		87 90
		5		70	821		200
		572		22 90	37		1,000
		645		100	8		25
		6		100	66		75
		8		100	77		800
		50		100	9		2 50
		1		100	88		93 40
		2		100	923		0 00
		9783		100	8		00 00
		4		100	9		100
		5		100	30		100
		7		100	66		8 10
		10107		00	75		50
		8		00	6		300
		14		50	9		137 43
		45		100	81		125
		6		100	2		25
		343		150	4		28
		411		4 44	12011		303 20
		89		25	2		10
		10519		100	6		38 96
		20		100	7		50
		630		0,000	21		1 31
		11017		000	2		25 00
		8		150	5		20 05
		9		00	32		4 70
		40		3	4		30 31
		80		200	5		140 63
		94		00 00	45		35
		8		0,000 00	8		5 70
		224		0,000 00	9		16 50
		356		50	50		18 81
		7		50	2		15
		8		50	3		10
		9		50	4		67
		60		50	6		246 87
11697—	7,000	120 57		609 05			
12079—	1,000	61		61 99			
12089—	115 93	3		74			
12091—	2,734 13	4		200			
	35,458 06			26,796 67			
3-3	62,254 73			36,559 65			
3-31	131,559 65						
	75,000						

261 Report on this account ten days after receipt.

CINCINNATI, —— —, 188–.

In account with the Fidelity National Bank of Cincinnati.

DR. *Monthly Statement.* CR.

	You charge:				You credit:		
4-8	Ass't tr. for c'y delivered to Cin'ti x	50,037 50		12-12	Letter	28,500 82	
	Ass't tr. for c'y delivered to Cin'ti x	50,037 50		1-11	Oneida	102 25	
4-10	Ret'd	10		3-19	Letter 3-17	90,853 73	
	"	3		4-6		168 99	
16	Ret'd pro. x	2 40			Carpenter	41 70	
25	Cash ret'd x	1 11		7	Letter	126,687 94	
27	Ret'd	4		9	Parker	300	
	" end	133 60			1st Ashvile	5,208 07	
		90 80		11	Weeks	13 65	
28	Exch'g's in 18 from Hayden, Columbus	14 40		25	Case	31	
30	Exch'g's in 20 from Hayden, Columbus x	16		28	Sargent & Co	200	
				30	Brown & Co	131 62	
					J. R. H. Thompson	471 30	
				28		555 86	
	We charge:				We credit:		
4-16	1st Ashville	10,000		4-1	Ret'd 4th Grand Rapids	909 26	
4-5	Letter	126,707 94		9	C'y	100,000	
9	Coll. 54142	167 58		14	Ch's listed 3-17 suit to Nat. Broadway	15,541 05	
11	F. B. 3669	294 42		29	Sent in error letter 4-27	241 50	
15	50180	261 44		5-3	Fees 1.11 each	2 22	

THE CHEMICAL NATIONAL BANK OF NEW YORK.

25	52405	1 85
29	Letter	69,964 85
30		80,872 09
3-1	46881	3 62
3-2	Error	86
3-7	"	59
13-17	Letter	115,406 38
2-10	"	28,599 79
2-21	Ret'd	1 65
		3 08
	Overdraft paid by claim and not cr. No. 12310	50,000

Our draft note cr. 12310	
Out in Feb. account	50 50
Your balance	111,761 29
Our balance	42,360 10
Drafts outstanding	49,441 95

Reconcilement sheet for April.

E. V. R.,
Special Examiner.

3280	100
4073	5
551	43
961	200
6321	000
950	0,000
1	000
7779	000
8024	000
694	000
8	000
752	50
9149	1,000 64
50	500
5	70
572	22 90
645	000
6	000
8	100
50	100
1	100
2	100
11356	50
7	50
441	100
575	0
12064	000
101	0,000
211	150
2	150
3	200
46	25
350	0,000 00
5	00 00
6	0,000 00
76	00 00
415	500

13147	75
9	00 00
62	25
7	100
88	17
205	0,000
6	000 00
40	450
56	60
8	100
94	1,884 20
300	1,000
16	000 00
20	9 17
91	00
417	35 40
38	14 95
66	10
75	00,000 00
81	600
2	700
6	12 19
528	25
42	150
78	000
90	231 10
6	200
616	61 25
21	18
4	350
36	1 75
44	70
52	93
63	000 00
85	50 99
87	99 80
96	24 55

262

508	0,000
20	000 00
37	000
608	00
11	1 60
3	00,000
752	000
90	0,000 00
846	93
8	172 58
50	500
1	500
2	500
3	300
85	25
94	0,000 00
931	0,000 00
13039	100
97	00
306	55
139	0,000
45	327 66
13777	58 34
9	5
80	9 58
1	175 90
2	100
3	503 80
4	124 94
90	24 80
3	2
4	4 15

7	7 92
8	34 21
700	2,400
10	114 79
1	500
3	0 00
5	150
6	10
7	00,000
9	11 90
25	200
7	6 66
9	1,000
31	0,000
44	150
60	50
1	79 50
5	87
7	21 28
8	22 26
70	10 68
1	4 80
2	431 10

6		57 91
7		218 24
8		6
801		122 57
2		59 39
3		3,105 39
5		2 30
6		249 80
7		249 80
8		1 80
9		55 91
11		19 53
12		15 59
13		108 15
15		318 13
16		52 30
		25,838 83
	13830	100 00
	1	50 00
	2	400 00
	3	5
	41	1,394 13
	8	40
	51	10
	8	2
	61	20
	4	40
4-30	163,232 96	
	137,394 13	
	25,838 83	

263 U. S. depository.

The Fidelity national bank.

Capital, $1,000,000.

Briggs Swift, president; E. L. Harper, vice-president; Ammi Baldwin, cashier; Benj. E. Hopkins, ass't cashier.

CINCINNATI, 5, 12, 1887.

W. J. Quinlan, cas., N. Y.

DEAR SIR: Your statement for April received, examined and find the following differences: On Dec. 12th, you or our letter of 10th as 28,500.82—we have this 28,599.79. Will you kindly return our letter as we are unable to trace the difference. We charge 4-9-167.58 in ours 4-4th. 4-11 in our 3-30 due 4-11-294 42, 4-15 in ours 3-10-261.44. Please examine and see if we are not correct as you advised them paid. We credit returned 969.26—you returned this item to 4th nat. bank (9th) Grand Rapids about the 12th of Feb. You credit 1-11 Oneida (Oneida Co.) says bk. rec. Jan'y 3, '87—102.25. We are unable to find this, does this belong to us, if so (star). Please report by number or date of letter.

You cr. 4- 6, 168 99	*25-18	Your chg. 4-90 fees, 167 58	
" 4- 6, 41 70		1 41	
" 4- 9, 300	*C. R. Carpenter, Pawtucket, R. I., rec'd about March 30th.		
" 4-11, 13 65	*Note Wm. Baker rec'd about Feb. 5, '87.		
" 4-25, 31	*Weeks, F. & Co., Woonsocket, R. I., rec'd about March 20th.		
" 4-28, 200	*Cases F., Woonsocket, rec'd about April 14th, acc't Sargent & Co., rec'd April, it credit 4-11, $261 44		
		294 42	
			$555 86

You cr. 4-28, 555 86	No. cr.	Cr. 4-11	
" 4-30, 131 62	4-28, Cr. 4-11	$261 44	
" 4-30, 471 30	81 29	294 42	
	67 66		

Please return this letter with your reply and oblige,

FIDELITY NATIONAL BANK,
Per WATTERS.

Note Brown & Bro., rec'd about April 11-18, J. R. H. Thompson, rec'd Feb'y 3, '87.
*Please report by number or date of letter.

N. Y., *May* 19, '87.

We have investigated the above and gave you the dates as near as we can without spending a great deal of time, and in some cases would have to write for the notes; presume you will be able to trace most of the items from the above information, if any should be too difficult, let us know and we will try and give you more information and where possible your letter dates.

W. J. QUINLAN, Jr.
F.

Letter as to reconcilement of April account.

E. V. R.,
Special Examiner.

264 Report on this account ten days after receipt.

CINCINNATI, —— —, 188..

In account with the Fidelity National Bank of Cincinnati.

Monthly Statement, May Reconcilement.

No. —.

DR.			CR.		
	You charge:			You credit:	
4-27	Ret'd	4	12-12	Letter	28,500 82
"	" end	133 60	3-19	" 3-17	99,853 73
"	" "	90 80	4-7	"	126,687 94
5-2	Fees	1 11	25	Case	31
3	Ret'd	12 50	5-3	Simon	257 62
11	Ex. on 17 P. Hayden & Co.	13 60		Loch	78 71
27	Ret'd	13 92	18	S. P. M. Pub. Co.	210
"	"	10 33	24	Sayer	0 00
"	"	25	27	Nash	10 80
28	"	50 60		Wright	5 25
			28	A. Reid	518 68
				2nd Parkersburg	7,000
			31	No. 58609	60 50
	We charge:			We credit:	
12-10	Letter	28,599 79	4-14	C'ks listed 3-17 suit to Nat. Broadway	15,541 05
2-21	Ret'd	1 65	29	Sent in error letter 4-27	241 50
"		0 00		Out in Feb. account	50 50
3-1	96881	0 00	5-17	Error	1 37
3-2	Error	86		Drafts outstanding	201,455 53
3-7	"	59			
3-17	Letter	115,406 38		Our balance	32,937 61
4-5	Letter	126,707 94			
9	Fees	1 41			
25	52405	1 85			
	Our d'ft by Chem. and notes No. 12310	50,000			
5-11	Coll. 57632	1 50			
23	Ret'd 5-18 cr. 6-10 and chg. acc't coll.	99 13			
27	Error	0 30			
31	Letter	161,819 08			
	Your balance	30,446 68			
	Error	09			

Reconcilement sheet for May.

E. V. R.,
Special Examiner.

3280	100	15326	1 65
4073	5	30	17 40
551	43	6	8
8752	50	7	6 45
9149	1,000 64	8	12 50
572	22 90	9	25
652	100	45	201 46
12211	150	7	50
850	500	8	342 23
1	500	9	44 55
2	500	65	69 94
3	300	66	69 75
13030	100	7	68 83
145	327 66	8	64 50
67	100	9	61 89
320	9 17	70	54 77
481	600	4	34 20
2	700	5	32 52

542		150	6		30 48
711		500	8		12
991		25	83		35
405		2 07	4		25
14263		25	5		64 95
317		300	7		23 34
15099		50	9		76 06
14507		87 50	90		1 40
677		25	7		2,000
710		25	9		50
804		28 35	401		650
18		100	5		43 12
24		1,000	11		36 90
31		50	21		100
38		50 15	2		100
43		110	3		100
4		38	4		50
76		112	425		1,000
966		300	6		50
7		8	30		25 11
265					
84		150	33		83 87
15135		10	5		306
79		16 12	5-31		184,490 90
89		100			
99		20 93			
231		36 57			
39		50			
59		35			
60		100			

Report on this account ten days after receipt.

CINCINNATI, —— —, 188-.

Chemical New York May reconcilement in account with the Fidelity National Bank of Cincinnati.

Monthly Statement.

No. —.

DR.			CR.		
x We charge			You credit		
4-5	Let. you cr., 4-7	126,707 94	4-25	Case *1	31
5-31	Letter	126,687 94	5-3	*2	257 62
		20		*3	78 71
		161,819 08	18	*4	210
			27	*5	10 80
				*6	5 25
			28	*7	518 68
			31	*8	60 50

Will you kindly see what this difference of 20.00 in our letters of 4-5th.

Please return this sheet with your reply and oblige, Fidelity, Heck.

x See back of sheet, dr'ft of 20.00 in footing your letter of which we notified you April 7th.

5. xxCredited June 7, '87.

(Letter as) to differences in May reconcilement.

E. V. R.,
Special Examiner.

On back of sheet:

82 30
17 72
100
8 63
38 35
1 50
5 74
10 80
26 54
87 85
10 13
1,368
16 25
3
50
50
232 16
6 15
43 95
136 70
24
1
24 94
59 83
30
52 50
75
10 13
10

2,583 17

* Please report by number or date of letter.

1 Case and F., Norwich, Ct., rec'd April 14th.
2 Will investigate and report.
3 Item on Berry, Ky. Rec'd about July 27th, think the bank at Berry remitted to you, as there was considerable delay in securing the money.
4-5 Peoble Co., Colo. rec'd about this date.
5 D'ft Nash & P., rec'd about May 27th.
6 " Wright & Co., rec'd about May 27th.
7 Note rec'd May 12, '87.
8 F. 12-10, rec'd May 31.

266 **Report on this account ten days after receipt.**

CINCINNATI, —— —, 188–.

Chemical New York reconcilement in account with the Fidelity National Bank of Cincinnati.

Monthly Statement.

DR. No. —. CR.

They charge and we do not cr.:

4-27	Ret'd x		4
"	" end x		133 60
"	" " x		90 80
6-2	Fees x		1 11
6	Interest on our draft x		42 41
7	Ret'd		345 71
15	Prem. pd. ass't tr. on 80,000.00 x.		60 00
17	Ret'd		490
	Prem. pd. ass't tr. on 100,000.00 x		75
	C. A. Cross		492 50
13	Fees x		1 88
20	Ret'd		50
	Fees		1 54
	Our Chem. cl'k No. 15529 not credited		4,133 33

We charge and they do not cr.:

3-17	Letter		115,406 38
4-5	"		126,707 94
6-4	63619 x		178 50
7	R. ac. 6-2 ret'd x		37 60
8	Ret'd 6-2 x		23 05
6-17	Order tran. F. from 1st N. Y.		50,000
14	Letters		126,200 78
15	Richmond, Va		4,300
17	Letter		50,466 87
18	62726 x		2 65
20	Mer. Atlanta		8,000
	66320		12
	Exchg. on our letter 6-13		11
	" " " " 6-15		10
	Our balance		349,799 57

They credit and we do not charge:

3-19	Our letter 3-17 11 60 ex. x		99,853 73
4-7	" " 4-5 20 00		126,687 94
4-25	Case		31
5-3	Simon		257 62
	Losh		78 71
6-3	Bunker		171 90
16	Our letter 6-14		20,000
	" " "		96,200 78
			4,000
18	Loan		200,000
20	Our letter 6-17		40,456 87
	A. F. Reid		345 25
	Mercantile		250
	"		250

We credit and they do not charge:

4-14	C'ks listed 3-17 sent to Nat'l Broadway		15,541 05
29	Sent in error letter 4-27		241 50
	Out in Feb. account		50 50
6-17	Ret'd		300
20	" 6-14 and fees		1,302 02
	" 6-17 "		5,002 02
	" "		494 04
	Exchange x		1 03
	Drafts outstanding		136,530 96
	Their balance		89,030 10

Reconcilement sheet for June.

E. V. R.,
Special Examiner.

1-6, '86	W. T. Stemler	4073	5
1-11, '87	W. H. Stanage	8757	50
1-21, '87	Rob't J. Smith	9149	1,000 64
2-1, '87	Witman Stove Co	9572	22 90
2-3, '87	Augusta Harbeson	8024	100
4-11	Joseph Orr	12850	500
"	" "	12851	500
"	" "	12852	500
"	" "	12853	300
4-18	Lizzie Stuart	13145	327 66
4-20	A. C. Tyler	13320	9 17
4-23	Mary S. Thoms	13542	150
5-2	Jas. S. Zerbe	13991	25
5-7	Henry M. Cist	14317	300
5-12	C. M. Thompson	14507	87 50
5-19	Louisa S. Hoel	14824	1,000
"	Mer. national, Des Moines, Iowa	14838	50 15
5-21	Ervin Maxwell	14984	150
5-28	F. E. Mackentepe	15421	100
6-1	F. H. Sibley	15567	25
6-2	Alliance Bkg. Co	15682	1 65
"	Robert Lundy	15710	3
6-3	H. A. Axline, adj. gen'l	15753	6
"	Geo. Koch	15757	10 44
6-4	Cinti. Oyster & F. Co	15858	6
6-7	Smith & McLarevin	15970	53 10
6-7	C. A. Blakely	15992	100
6-7	W. W. Whitaker	16020	25
6-8	John H. Bynum	16055	12
"	C. W. H. Luebbert	16059	700
6-10	G. A. Roberg	16134	59
"	C. M. Thompson	16143	233 33
"	Bank of St. Lawrence	16158	16 90
6-16	J. M. Mans & Co	16475	11
"	Goodyear R. Co	479	19 20
"	N. Y. Rub. Co	481	5 10
"	Mattson Rub. Co	485	14
"	Davidson " "	486	27 98
"	Tyler " "	490	4 32
"	F. Pustet & Co	494	110 84
"	" "	496	9 08
"	" "	497	20 51
"	S. D. Powell	501	35
"	H. & S. Pogue	503	29 38
"	" "	504	57 85
"	" "	507	141 74
"	" "	508	24 90
"	" "	516	41 36
"	" "	520	19 74
"	Lewis H. Utz	526	42 26
"	" "	527	32 90
"	Kingery Mfg. Co	528	50
"	A. Bosworth, cas	530	124 80
"	Hamilton & Baker	531	16 15
"	Jas. D. Kelly, cas	532	39 80
"	Milford nat'l, O	534	1 25
"	Pulle & Elliott	537	75 90
"	" "	538	43 24
"	Geo. A. S. Wilson	540	46 20
"	Armour & Co	541	200 21
"	Dan. Head & Co	543	683 70
"	F. & H. Foust & Co	544	49 80
"	E. Bennett & Sons	546	84 40
6-17	E. B. Gosline	548	27
"	Fr. of Johnson Co	549	24 60
"	" Wilson Co	550	22
"	" Butler Co	551	15
"	A. H. Seinsheimer & Co	552	894 23
"	Masonic Mut. Life Ass'n	553	85 60

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6-11	State bk., Lima	16175	175 84
"	M. M. Eaton	16242	150
"	M. D. Call & Co.	16267	85 08
"	Bexar Co. sav. bk.	16275	24 80
6-13	A. W. Simcock	16295	2 30
"	Kingery Mfg. Co.	16337	50
6-13	Lima H. Fish	16338	3 28
"	P. B. Fraser, cas.	16353	9 80
"	E. L. Welch, cas.	16356	384 80
"	J. B. Watkins Bkg. Co.	16360	599 80
6-14	F. Pustet & Co.	16365	57
"	Hall & Stebbins	16372	12
"	Byron Weston	16373	584 34
"	S. J. Stevens	16379	150
"	W. D. Freeman	16386	30 78
"	" "	16387	24 30
6-15	Am. Ex. Chicago	16412	100,000
"	Pratt & Cady Co.	16418	148 83
"	W. S. Evans	16422	150
"	H. & S. Pogue	16425	64 87
"	" "	16427	37
6-15	M. A. McGuire	16452	85 92
"	Horswell & French	16454	110 47
"	Herkimer bk., N. Y.	554	39 22
"	S. H. Tingley, cas.	555	205 10
"	M. P. Pegram, "	556	35 80
"	J. A. Irvin, "	557	4,995 03
"	Knauth, Nachoo & K.	560	24 75
6-17	S. J. Broadwell	561	5
"	W. L. Douglas	559	141 30
"	Knauth, Nachor & K.	564	44 10
"	John Brofield	565	12 50
"	Excelsior Seat Co.	567	74 80
"	Comstock & Couse	568	19 66
"	W. D. Freeman	569	7 27
"	" "	570	60 92
"	H. P. Lloyd	572	30
"	H. Z. & H. Oppenheimer	573	106 08
"	Adolph Meyer & Co.	574	1,000
"	B. H. Kroeger	575	34 31
"	Perry & Co.	577	1 88
"	S. K. Martin, L. & Co.	576	157 89
6-18	G. A. Roberg	578	88 30
"	" "	579	112 80
"	" "	580	104 79
"	" "	581	278 76
"	" "	16582	36 29
"	" "	583	12 58
"	Edgar M. Moore	584	198
"	Pulle & Elliott	586	24 41
"	" "	587	35
"	Mrs. H. J. Snider	588	100
"	Henry Bainbridge & Co.	589	40 85
"	F. Pustet & Co.	590	1,500
"	F. Helffuench & Son	591	261 53
"	" " "	592	20 40
"	Mrs. J. H. Elbert	593	15
"	J. H. Weston	596	1,500
"	J. F. Lamg & Co.	597	117 63
"	Mrs. M. R. Lovett	598	100
"	Buddeke Bros. & Co.	600	172 25
"	" " " "	601	56 50
"	" " " "	602	36 90
"	" " " "	603	15 61
"	" " " "	604	78
6-20	Williams & Rogers	605	16 20

Please report within ten days.

——, —— —, 188–.

Chemical National Bank, New York, to Fidelity National Bank of Cincinnati, Ohio.

Your statement of account for the month of ——, 188–, is received, examined and found correct, with the following exceptions:

You charge and we do not cr.:

6-20	Ret'd.		50
	15529		4,133 33
5-12			00 00

You credit and we do not charge:

5-3	4th Columbus	257 62
5-3		78 71
6-3	Bunker	171 90
6-28	127227	
22	10000	
25	7126011	984 87
30		401 89
7-6		2 85
6-8	Loan	2,000 00

We charge and you do not cr.:

		38,447 74
		3 08
	Our balance	399,980 07
		442,611 14

We cr. and you do not charge:

	Drafts outstanding	136,530 96
6-6	L. 6-14	8 51
6-20	Fees 6-20	1 88
	Error 6-20	1 20
	Your balance	92,888 60
		442,611 14

In reconciling, report our collection by number.

Respectfully,

Signature. —— ——. 1 20

Attempt at reconcilement of June account.

E. V. R.,
Special Examiner.

268 David Armstrong, receiver of the Fidelity national bank.

Capital, $1,000,000.

CINCINNATI, *July* 12, '87.

Chem. N. Y.

DEAR SIR: Your account current received and examined and find the following differences.

You charge:

71
6-7 Ret'd 345 Please give date of our letter containing this.

00
17 Ret'd 490 Please give date of our letter containing this.

00
20 Ret'd 050 Please give date of our letter containing this.

You credit:

62
5-3 Simon 257 (S) Please report by number or date of letter.

71
5-3 Losh 78

90
6-3 Bunker 171

25
20 A. F. Reid 345

20000 78 00
16 L 6-14 9620078 we have it 126200 difference 10000

87 87 00
20 L 6-17 40456 we have it 50466 difference 10010

Please examine and explain.

Armstrong letter to Chemical July 12, 1887, E. V. R., special examiner.

Chemical national bank.

NEW YORK, *July* 6, 1887.

Edward Armstrong, Esq., receiver.

DEAR SIR: Several days ago when I wrote you I did not state that the Fidelity nat. bk. had 2 loans from us—$300,000, dated M'rch 2, '87; $200,000, dated June 17, '87—as I understood P't Williams had so stated in his letter.

Resp'y, WM. J. QUINLAN, JR.

Letter from Quinlan to Armstrong, July 6, 1887, E. V. R., special examiner.

269 Chemical national bank.

NEW YORK, *May* 11, 1887.

Ammi Baldwin.

DEAR SIR: You report drft. $200 in crediting your letter March 04 85 85 7th, $106,025 you listed item $10 should be 110 letter-sheet No. 21 61000

We overcredited 3–15 3,785.72; should be 3,685.72. Correct April 19, $100.

Very resp'y, W. J. QUINLAN, JR.

Letter from W. J. Quinlan to Ammi Baldwin, May 11, 1887. E. V. R., special examiner.

Chemical national bank.

NEW YORK, *May* 18, 1887.

Ammi Baldwin.

DEAR SIR: Herewith find your letter of Dec. 10th for inspection and return.

You report chrg. 4–9 letter 4–4 $167.58; we credited letter 4–6 fees 167.58, 168.99. 141

Will report on other exceptions in a few days.

Very resp't., W. J. QUINLAN, JR.

Letter from Quinlan to Baldwin, May 18, 1887. E. V. R., special examiner.

United States Circuit Court, Southern District of Ohio, Western Division.

CHEMICAL NATIONAL BANK *vs.* DAVID ARMSTRONG, as Receiver of the Fidelity National Bank. } Stipulation. No. 4339.

It is agreed that if the complainant herein shall see fit to offer in evidence a printed copy of the bill of complaint and of the
270 evidence, or of any part of the evidence, filed in the cause of David Armstrong, receiver of the Fidelity national bank, *vs.* Brigg Swift and others, No. 4054, upon the docket of this court, and certified copies of any other pleadings, files, journal entries and docket entries in said cause, then no objection shall be taken by the defendant herein, because the whole of the record in said cause is not offered, nor as to said printed copies, because the same are not certified as true copies by the clerk, and all such objections are waived; but the right to make any and all such objections thereto is reserved by the defendant.

It is also agreed that the bill of complaint in said cause No. 4054, upon the docket of this court, was filed on the 18th day of Septem-

ber, 1887; that process was duly issued thereon and served upon the defendants named in said bill; that said defendants duly entered their several appearances in said action; that after the filing of sundry demurrers and pleas, issue was finally joined upon answers; that thereafter, on June 15, 1888, E. V. Ryan was appointed special examiner in said cause, and proceeded to hear evidence upon behalf of the plaintiff; that on January 29th, 1889, the evidence so taken was filed by said examiner, and that the same was afterwards printed by order of court in said cause.

Cincinnati, October 14th, 1895.

WM. WORTHINGTON,
Counsel for Complainant.
JOHN W. HERRON,
Counsel for Defendant.

Endorsed on back: 4339. United States circuit court, so. district of Ohio, west. div. Chemical National Bank *vs.* David Armstrong, as receiver, etc. Stipulation as to files in No. 4054 in this court.

271 Circuit Court of the United States, Southern District of Ohio, Western Division.

DAVID ARMSTRONG, Receiver of the Fidelity National Bank of Cincinnati, Ohio, Complainant, *vs.* BRIGGS SWIFT, EDWARD L. HARPER, WILLIAM H. Chatfield, Henry Pogue, Albert P. Gahr, James H. Mathews, Eugene Zimmerman, Ammi Baldwin, and Benjamin E. Hopkins, Respondents.	In Chancery. Bill.

To the judges of the circuit court of the United States for the southern district of Ohio, western division:

1. David Armstrong brings this his bill and says that the Fidelity National Bank of Cincinnati, Ohio, was a national bank, duly organized and incorporated under the acts of Congress, and doing business in the city of Cincinnati, Hamilton county, Ohio.

2. Complainant further says that he is a citizen and resident of the State of Ohio, and that at and before the 27th day of June, A. D. 1887, the Comptroller of the Currency found the said banking association had become insolvent; and thereupon, this complainant was duly appointed by the Comptroller of the Currency, and became duly qualified as, the receiver of the said The Fidelity National Bank of Cincinnati, Ohio, and entered into possession of its property and assets, and has ever since been in possession thereof, as such receiver, for the purpose of administering the same in pursuance of the acts of Congress.

3. The complainant further says that the said The Fidelity National Bank of Cincinnati became and was incorporated on or about the 1st day of March, A. D. 1886; and the said Briggs Swift,

Edward L. Harper, William H. Chatfield, Henry Pogue, Albert P. Gahr, James H. Mathews, Eugene Zimmerman, Ammi Baldwin and Benjamin E. Hopkins, all of whom are citizens and residents of the State of Ohio, became and were duly elected and qualified as directors of said banking association; and the defendant, Briggs Swift, became and was president of said banking association; and the said E. L. Harper became and was vice-president of said association; and the said Ammi Baldwin became and was cashier of said association;
and the said Benjamin E. Hopkins became and was assist-
272 ant cashier of said banking association; and the said board of directors of said banking association, and its officers as aforesaid, had the charge and management of all the property and affairs and business of said banking association at the times hereinafter mentioned.

4. The complainant further says that said Briggs Swift, president; E. L. Harper, vice-president, and Ammi Baldwin, cashier, and Benjamin E. Hopkins, assistant cashier, the officers of said association, did knowingly permit the total liabilities to said association of a certain firm known as "Wilshire, Eckert & Company," also doing business under the firm name of "J. W. Wilshire & Company," and composed of Joseph W. Wilshire and Howard Eckert, and doing business in the city of Cincinnati and State of Ohio, for money borrowed, including in the liabilities of said company or firm the liabilities of the several members thereof, to exceed one-tenth part of the amount of the capital stock of such association actually paid in, not including in said indebtedness the discount of bills of exchange drawn in good faith against actually existing values, nor the discount of commercial or business paper actually owned by the said firm of Wilshire, Eckert & Company, and the several members thereof.

5. The complainant further says that the said banking association was found by the Comptroller of the Currency, on the 20th day of June, A. D. 1887, to be utterly insolvent, and that the indebtedness of the said Wilshire, Eckert & Company, and of the individual members of said firm at that time, for money borrowed by said firm and the individual members of said firm, consisted of the following sums, incurred at the dates named, to wit:

1887.			
Jan.	31.	Upon check on First nat. bank, Cin'ti, payable to J. W. Wilshire.....	$17,500 00
Feb.	15.	Upon check of J. W. Wilshire & Co. on Merchants' nat. bank payable to Wilshire, Eckert & Co.....	16,500 00
1886.			
March	20.	Upon loan of that date.....	7,500 00
March	24.	Upon loan of that date.....	4,200 00
April	21.	Upon check on First nat. bank, Cin'ti, payable to J. W. Wilshire.....	6,000 00
May	21.	Upon note, ditto.....	16,178 40
Oct.	7.	Upon note, ditto	6,000 00

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Oct.	9.	Upon loan, ditto	15,000 00
Oct.	11.	Upon note, ditto	2,000 00
Oct.	12.	Upon note, ditto	11,500 00
Nov.	29.	Upon note, ditto	8,500 00
1887.			
Feb.	1.	Upon check to J. W. Wilshire & Co. of that date	8,756 92
Feb.	7.	Ditto	6,500 00
Feb.	9.	Loaned to Wilshire, Eckert & Co. upon a note of that date	60,000 00
March	17.	Upon check of that date	95,000 00
March	20.	Upon check of that date	55,600 00
March	24.	Upon check of that date	26,410 00
April	5.	Upon note of that date	34,458 75
April	16.	Upon note of that date	8,200 00
April	28.	Upon check of that date	100,000 00
April	30.	Upon check of that date	100,000 00
May	5.	Upon note of that date	34,779 38
May	7.	Upon check of that date	15,000 00
May	28.	Upon check of that date	250,000 00
May	31.	Upon check of that date	100,000 00
May	31.	Upon check of that date	75,000 00
June	2.	Upon check of that date	75,000 00
June	13.	Upon draft of that date	90,000 00
June	14.	Upon draft of that date	200,000 00
		Making in the aggregate the sum of.	$1,446,083 45

6. And the complainant says, that the aforesaid liabilities of Wilshire, Eckert and Company, and of the several members thereof, for money borrowed, were contracted with the knowledge and assent of each of the said directors, or if either of said directors failed to have actual knowledge thereof, that such director was grossly negligent of his duty in the management of the affairs of said bank, in failing to examine the books of accounts and evidences of indebtedness held by said bank during all the period in which said liabilities were being contracted, and in failing to exercise the slightest diligence or make the slightest investigation of the conduct of the business of said bank; and that any investigation of the affairs of said bank, or any examination of its books and the evidences of indebtedness held by said bank, would at any time during that period have disclosed to either of said officers or directors, that said liabilities were incurred, and the amounts and the extent thereof.

7. This complainant further says, that the said Wilshire,
274 Eckert and Company, and the individual members of said firm, and the makers or endorsers of all of the notes mentioned as given for money loaned to the said Wilshire, Eckert and Company, or to the members of said firm, were and are, altogether insolvent; and that said moneys have been totally lost to said banking association; that said Wilshire, Eckert and Company were

residents of Cincinnati, Ohio, and were at any of the times during which said indebtedness was being contracted, well known in the community, as being of little or no responsibility or means, and altogether irresponsible for, and unable to meet or discharge, any part of said liability in excess of the one-tenth of the amount of the capital stock of said association actually paid in, and that said loans were in violation of the law in that behalf, and were permitted and allowed to be made and contracted by the said directors and officers and each of them, in gross and willful disregard of their duty as such directors and officers, and to the loss and damage of said association in the full amount of said loans.

8. And complainant further says, that the respondent, E. L. Harper, vice-president of said association, was a member of the firm of E. L. Harper and Company; the individual members of said firm were the said E. L. Harper, George Clymer, and W. H. Harper; and the said E. L Harper was also the sole owner of the stock of the company known as "the Riverside iron and steel works," which claimed to be an incorporated company under the laws of Ohio, but which was in fact a company that had never complied with the laws of Ohio to become incorporated; that never had any *bona fide* capital stock, never had any property, and was organized for the purpose of presenting a corporate name in which, and under cover of which the said E. L. Harper and the said E. L. Harper and Company transacted business; and the said E. L. Harper was the principal owner of the capital stock of Swift's iron and steel works, which was a corporation organized and doing business in the State of Kentucky, of which corporation the said E. L. Harper was president, and the employees and representatives of the said E. L Harper were by him selected and constituted the directors of said corporation.

9. And the complainant further says, that the said Briggs Swift, president, E. L. Harper, vice-president, Ammi Baldwin, cashier, and Benjamin E. Hopkins, assistant cashier, the officers of said association, the Fidelity National Bank of Cincinnati, Ohio, did knowingly permit the total liabilities of the said E. L. Harper and Company, for money borrowed, including in the liabilities of
275 said company or firm the liabilities of the several members thereof, to exceed one-tenth part of the amount of the capital stock of said association actually paid in, not including in said indebtedness the discount of bills of exchange drawn in good faith against actually existing values, nor the discount of commercial or business paper actually owned by the said firm of E. L. Harper and Company or the several members thereof.

10. Complainant further says, that the indebtedness of the said E. L. Harper and Company and of the individual members of said firm, on the 20th day of June, A. D. 1887, for money borrowed by said firm and the individual members of said firm, consisted of the following sums incurred at the dates named, to wit:

1886.			
Oct.	21.	Of a call loan contracted in the name of the Riverside iron and steel works.....	$52,557 80
1887.			
Jan.	11.	Note of said R. I. & S. works discounted for E. L. Harper & Co...	4,834 67
Feb.	4.	Note of said R. I. & S. works, discounted for E. L. Harper & Co.....	3,781 16
Feb.	5.	Note of Licking Iron Co., discounted for E. L. Harper & Co.....	3,859 40
Jan.	13.	Note of the Latrobe Coal and Iron Co., discounted for E. L. Harper & Co	3,914 36
March	16.	Ditto...	3,147 67
March	24.	Ditto.....	2,985 86
March	25.	Ditto.....	1,487 63
March	26.	Ditto...	2,852 88
April	1.	Ditto.....	2,489 65
1886.			
Dec.	18.	Note of the Licking Iron Co., discounted for E. L. Harper.....	2,988 00
Dec.	24.	Ditto.....	3,428 00
1887.			
Jan.	15.	Ditto.....	3,740 00
Jan.	16.	Ditto.....	2,950 50
Jan.	19.	Ditto.....	3,228 00
Jan.	20.	Ditto.....	2,255 20
Jan.	22.	Ditto.	4,325 40
Jan.	29.	Ditto.....	3,557 00
Feb.	3.	Ditto...	4,217 14
276			
Feb.	9.	Ditto.....	3,154 00
March	17.	Ditto...	4,102 99
March	19.	Ditto.....	3,064 33
		Amount carried forward.....	$122,921 64
		Amount brought forward.....	$122,921 64
March	24.	Note of the Licking Iron Co., discounted by E. L. Harper.....	2,460 78
March	30.	Ditto.....	2,591 62
March	14.	Call loan of H. S. Bundy, discounted for E. L. Harper.....	50,000 00
March	14.	Ditto.....	50,000 00
April	28.	Note of Whitely, Fassler & Kelly, disc'd for E. L. Harper & Co.....	5,480 10
April	21.	Ditto...	5,420 71
April	21.	Ditto.....	5,330 44
April	28.	Ditto.....	5,891 04
May	3.	Ditto	5,580 09

May	3.	Ditto	5,317 00
May	4.	Ditto	4,820 03
1886.			
Dec.	27.	Note of the Wellston Foundry & Machine Co., discounted for E. L. Harper & Co.	2,312 72
1887.			
Feb.	12.	Ditto	1,585 70
March	17.	Ditto	2,483 27
April	11.	Ditto	2,950 25
Jan.	4.	Note of the Catoctin Iron Co	3,590 50
Jan.	10.	Ditto	3,900 00
Feb.	7.	Ditto	3,175 00
Jan.	11.	Note of the Riverside iron & steel works	4,834 67
Feb.	4.	Ditto	3,781 16
Jan.	20.	Note of the Eliza Furnace & Coal Co	2,563 40
Jan.	24.	Ditto	3,608 88
Feb.	9.	Note of the Standard Nail & Iron Co	2,067 11
Feb.	12.	Note discounted for same	4,786 22
March	7.	Note of Swift's iron & steel works, endorsed by E. L. Harper	5,000 00
April	30.	Ditto	10,000 00
April	30.	Ditto	10,000 00
April	30.	Ditto	10,000 00
277			
May	3.	Ditto—discounted for E. L. Harper	25,000 00
May	18.	Ditto—endorsed for E. L. Harper	10,000 00
May	27.	Ditto	10,000 00
June	8.	Ditto	5,000 00
June	15.	Upon a check drawn by E. L. Harper	1,683 08
		Making in aggregate the sum of...	$394,135 41

11. This complainant further says, that the said E. L. Harper and the officers and directors of the said association did knowingly permit the total liabilities of the said Swift's iron & steel works to the said association for money borrowed (in addition to the money loaned upon the paper of the said Swift's iron and steel works, as hereinbefore set forth, and upon which said Swift's iron & steel works were liable to said banking association), to exceed one-tenth part of the amount of the capital stock of said banking association actually paid in, not including in said indebtedness the discount of bills of exchange drawn in good faith against actually existing values, nor the discount of commercial or business paper actually owned by the said Swift's iron & steel works; and that the indebtedness of the said Swift's iron & steel works for money by it borrowed on the 20th day of June, A. D. 1887, in addition to its indebtedness as hereinbefore set forth, consisted of the following sums incurred at the dates named, to wit:

1886.			
Dec.	10.	Note of Whitely, Fassler & Kelly, discounted for Swift's iron & steel works..	$4,218 72
Dec.	13.	Ditto....	3,218 00
Dec.	15.	Ditto....	4,873 74
April	23.	To H. C. Darley, Kansas City, Mo	1,212 91
May	23.	Ditto....	1,433 73
Sept.	1.	Call loan made said Swift's iron & steel works...	25,000 00
Sept.	1.	Ditto....	12,000 00
Sept.	1.	Demand loan....	40,000 00
1887.			
March	3.	Draft on W. S. Mallory & Co., Chicago, Ills....	903 45
April	4.	Draft on Sidney Steel Scraper Co., Sidney, O....	1,286 33
April	9.	Draft on Gille & Van Peyman, Kansas City, Mo....	741 47
278			
May	10.	Ditto....	465 25
May	27.	Draft on Hanika Iron Fence Co., Springfield, O....	775 91
May	23.	Loan made to Swift's iron & steel works, upon a check drawn on the German national bank....	62,000 00
May	23.	Loan made to Swift's iron & steel works, upon a check drawn on S. Kuhn & Sons.	59,000 00
		Of a loan made to Swift's iron & steel works at some date which this complainant does not know and is unable to state, but which is represented by a check given in place of the original evidence of indebtedness held for said loan, which check is dated June 18, 1887....	35,000 00
		Making in the aggregate the sum of.	$252,129 51

12. And this complainant says that the aforesaid liabilities of the said E. L. Harper & Company, and of the several members thereof, and of Swift's iron & steel works, for money borrowed, were contracted with the knowledge and assent of each of the said directors, or if either of said directors failed to have actual knowledge thereof, that said director was grossly negligent of his duty in the management of the affairs of said bank, in failing to examine the books or accounts and evidences of indebtedness held by said bank, during all the period in which said liabilities were being contracted, and in failing to exercise the slightest diligence or make the slightest investigation of the conduct of the business of said bank; and that any investigation of the affairs of said bank or examination of its books and evidences of indebtedness held by said bank, would, at any time during that period, have disclosed to either of said officers

or directors that said liabilities were incurred and the amount and extent thereof.

13. The complainant further says that the said E. L. Harper & Company, and the individual members of said firm, and the makers or endorsers of all the notes mentioned as being given for money loaned to the said E. L. Harper & Company, and the individual members of said firm, and Swift's iron & steel works, and the makers or endorsers of all of the notes mentioned as being
279 given for money loaned to the said Swift's iron & steel works, were and are altogether insolvent, and that said moneys have been wholly lost to the said banking association. That the said E. L. Harper was the vice-president of said banking association at each and all of the times during which said indebtedness was being contracted; that he was permitted by the directors of said bank to manage its affairs and loan its money to himself, and to the firm of which he was a member, and to the various corporations named, of which he was the principal owner, without any supervision, investigation or control of his management of the business of said banking association in that behalf, or of the responsibility of any of the persons making or endorsing said notes or checks, and without said banking association having or receiving any security for the payment of said indebtedness, and that each and all of the parties to said notes and checks, either as makers or endorsers, are wholly insolvent, and the moneys so loaned to said parties, as aforesaid, in excess of one-tenth of the amount of the capital stock of said association actually paid in, were loaned in violation of the law in that behalf; and that said indebtedness was, by the said directors and officers, and each of them, permitted and allowed to be made and contracted in gross and willful disregard of their duty as such directors, and said money has thereby become wholly lost to said banking association.

14. The complainant further says that the said Briggs Swift, president; E. L. Harper, vice-president; Ammi Baldwin, cashier, and Benjamin E. Hopkins, assistant cashier, the officers of said association, did knowingly permit the total liabilities to said association of a certain corporation under the laws of Ohio, by the name of Whitely, Fassler & Kelly, and doing business in the city of Springfield and State of Ohio, for money borrowed, to exceed one-tenth part of the amount of the capital stock of said banking association actually paid in, not including in said indebtedness the discount of bills of exchange drawn in good faith against actually existing values, nor the discount of commercial or business paper actually owned by said corporation of Whitely, Fassler & Kelly.

15. And complainant further says that the said indebtedness of the said Whitely, Fassler & Kelly, on the 20th day of June A. D. 1887, for money borrowed by said corporation, consisted of an overdraft of the account of said Whitely, Fassler & Kelly in said banking association, by divers checks made and drawn by said
280 Whitely, Fassler & Kelly and paid by said banking association between the 1st day of May, A. D. 1887, and the 20th day of June, A. D. 1887, aggregating the sum of $121,604.90; and

in addition to the indebtedness of said Whitely, Fassler & Kelly, as hereinbefore set forth, the following sums loaned to said corporation at the dates named, to wit:

Of the notes of said Whitely, Fassler & Kelly, discounted for said corporation and endorsed by E. L. Harper & Co. for said Whitely, Fassler & Kelly.

1887.			
Feb.	7.	Note for	$2,650 00
Feb.	14.	Note for	3,840 20
Feb.	21.	Note for	4,630 10
Feb.	21.	Note for	4,270 93
Feb.	28.	Note for	4,883 30
Feb.	28.	Note for	4,883 40
Feb.	28.	Note for	5,850 00
Feb.	28.		5,200 00
March	28.	Note for	5,432 00
April	5.	Note for	5,300 00
April	5.	Note for	3,800 00
April	18.	Note for	2,500 00
April	18.	Note for	4,740 00
May	2.	Note for	2,620 40
May	2.	Note for	2,340 10
May	2.	Note for	3,911 07
May	2.	Note for	3,107 90
May	4.	Note for	4,280 00
May	4.	Note for	2,210 49
May	4.	Note for	4,710 09
May	4.	Note for	4,520 00

And of the notes of the Champion Machine Company endorsed by said Whitely, Fassler & Kelly, discounted for said last-named corporation, as follows, to wit:

1887.			
Jan.	24.	Note for	4,891 04
Feb.	7.	Note for	5,000 00
Feb.	7.	Note for	4,280 00
Feb.	21.	Note for	4,500 00
Feb.	21.	Note for	5,620 19
Feb.	28.	Note for	4,500 00
March	28.	Note for	5,451 00
April	5.	Note for	4,300 00
April	5.	Note for	5,500 00
April	18.	Note for	4,370 00

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April	18.	Note for	3,500 00
April	18.	Note for	5,872 20
April	18.		4,500 00
April	26.		4,500 00

April	26.	Note for	5,000 00
May	2.	Note for	5,610 20
May	2.	Note for	5,200 00
May	2.	Note for	4,500 00
May	2.	Note for	3,000 00
May	2.	Note for	3,240 00
		Amount carried forward	$179,014 52
		Amount brought forward	$179,014 52
May	4.	Note for	4,500 00
May	4.	Note for	3,750 00
May	4.	Note for	4,231 00
May	4.	Note for	4,650 00
May	4.	Note for	5,480 10
May	4.	Note for	3,800 00
June	2.	Note for	3,841 08
June	2.	Note for	4,000 00
June	2.	Note for	5,000 00
June	2.	Note for	4,273 18
June	2.	Note for	5,000 00
June	7.	Note for	4,520 10
June	7.	Note for	6,720 00
June	7.		4,780 20
June	7.	Note for	5,817 00
June	7.	Note for	4,000 00
June	7.	Note for	3,800 00
		Add amount of overdrafts as above	121,604 90
		Making in the aggregate the sum of	$378,782 08

16. And this complainant says that the aforesaid liabilities of the said Whitely, Fassler & Kelly were contracted with the knowledge and assent of each of the said directors, or if either of said directors failed to have actual knowledge thereof, that said director was grossly negligent of his duty in the management of the affairs of said bank in failing to examine the books of accounts or evidences of indebtedness held by said bank during all the period in which said liabilities were being contracted, and in failing to exercise the slightest diligence or make the slightest investigation of the conduct of the business of said bank, and that any investigation of
282 the affairs of said bank or any examination of its books and of the evidences of indebtedness held by said bank, would at any time during that period have disclosed to either of said officers or directors that said liabilities were incurred and the amounts and the extent thereof.

17. And this complainant further says that the said Whitely, Fassler & Kelly, the makers or endorsers of any of the notes mentioned as being given for money loaned to the said Whitely, Fassler & Kelly, were and are, altogether insolvent, and that said moneys have been totally lost to said banking association; and that the

moneys so loaned to the said Whitely, Fassler & Kelly in excess of the amount of one tenth of the capital stock of the said association actually paid in, were loaned in violation of the law in that behalf; and that said indebtedness was permitted and allowed to be made and contracted by the said directors and officers, and each of them, in gross and willful disregard of their duty as such directors and officers; and said money has thereby become wholly lost to said banking association.

18. The complainant further alleges that the said Briggs Swift, president; E. L. Harper, vice-president; Ammi Baldwin, cashier, and Benjamin E. Hopkins, assistant cashier, the officers of said association, did knowingly make the loans and discount the paper upon the security of the shares of its own capital stock, at the dates and in the sums following to wit:

1887.			
April	18.	Amann & Co.	$1,300 00
Feb.	26.	W. H. Broadwell	6,250 00
March	7.	Wm. H. Broadwell	4,893 75
June	11.	Dunlap & Co.	4,500 00
May	9.	Dunlap & Co.	1,200 00
May	20.	Dunlap & Co.	2,375 00
April	22.	Dunlap & Co.	1,450 00
April	5.	D. A. Fitzpatrick	1,350 00
April	27.	W. D. Gatchell	3,987 00
April	2.	W. D. Gatchell	1,000 00
May	9.	W. D. Gatchell	1,000 00
			$29,296 75
		Amount brought forward	$29,296 75
June	8.	W. D. Gatchell	900 00
May	16.	W. D. Gatchell	900 00
May	7.	A. J. Gilligan	1,080 00
June	18.	Benj. Hopkins	1,000 00
283			
April	5.	W. P. Harris	12,500 00
April	7.	Frederick Heguer	2,500 00
April	5.	W. H. Stanagef	5,400 00
May	25.	E. T. Sprague	2,500 00
March	28.	H. B. Wells	5,500 00
		Making in the aggregate the sum of..	$56,576 75

19. Complainant further says that the aforesaid liabilities to said association secured by the shares of its own capital stock, were for money borrowed from said association, and were contracted with the knowledge and assent of each of the said directors, or if either of said directors failed to have knowledge thereof, that said director was grossly negligent of his duty in the management of the affairs of said bank in failing to examine the books of accounts or evi-

dences of indebtedness held by said bank during all the period in which said liabilities were being contracted, and in failing to exercise the slightest diligence or make the slightest investigation of the affairs of said bank, and that any investigation of the affairs of said bank or examination of the books of accounts and evidences of indebtedness held by said bank, would, at any time during said period, have disclosed to either of said officers or directors that said liabilities were incurred and the amount and the extent thereof, and that they were secured by the shares of the capital stock of said association, and not otherwise. And the complainant avers that such security was not necessary to be taken by said association to prevent loss upon any debt previously contracted in good faith, and that the makers and endorsers of the notes mentioned as given for money so loaned by said association upon the security of its own capital stock, are altogether insolvent, and that the said capital stock, by reason of the premises set forth in this petition, has become wholly valueless, and that said moneys have been totally lost to said banking association; and the petitioner says that said loans were in violation of the law in that behalf, and were permitted and allowed to be made and contracted by the said directors and officers, and each of them, in gross and willful disregard of their duty as such officers and directors, and to the loss and damage of the said association in the full amount of said loans.

20. And complainant further avers that the said E. L. Harper, vice-president of said association, was permitted by the directors of said bank to manage the affairs of said banking association
284 and to have the charge and control of its moneys and other assets, without any investigation or control of his management of the business of said banking association; and that the board of directors of said association did not require from the said E. L. Harper, or any other of the officers of said banking association, any bonds for the faithful performance of his duties as such officer of said association, nor any other security against the misappropriation by such officer of the moneys and assets of the association as, according to usage in the conduct of such business, and otherwise, it was right and proper should have been required of them.

21. And the complainant further avers that at divers times between the 1st day of January, A. D. 1887, and the 20th day of June, A. D. 1887, the said E. L. Harper did embezzle, misappropriate and convert to his own use very large sums of money belonging to said association, the precise dates and amounts of such embezzlement and misappropriation the complainant does not know and is unable to state, but he avers the aggregate amount thereof to be not less than the sum of $500,000. Complainant further avers that between the said dates, to wit, the 1st day of January, A. D. 1887, and the 20th day of June, A. D. 1887, the said E. L. Harper, Ammi Baldwin and Benjamin E. Hopkins, did issue the drafts, bills of exchange and other obligations of said banking association for which the said association received no consideration, but which the said E. L. Harper and Benjamin E. Hopkins misappropriated and converted to their own use in divers speculations in wheat, in which the said

E. L. Harper and Benjamin E. Hopkins, with other persons, were, during that period, engaged.

22. Complainant further says that the said E. L. Harper and Benj. E. Hopkins were engaged during the period between the 1st day of January, A. D. 1887, and the 20th day of June, A. D. 1887, with divers other persons, in speculating in wheat in the city of Chicago, in the State of Illinois, purchasing and contracting for more than thirty million bushels of wheat, upon which the said parties were advancing margins and borrowing money for the principal part of the prices agreed to be paid therefor.

23. The complainant avers that a large part of said purchases were gambling transactions, and complainant avers that the said Briggs Swift and the other respondents, directors of said banking association, had notice and knowledge that the said E. L. Harper and Benjamin E. Hopkins were engaged in said speculations; and complainant avers that the moneys hereonbefore alleged to have been loaned the firm of Wilshire, Eckert & Co., and the in-
285 dividual members of said firm, and the firm of E. L. Harper & Company, and to the companies and corporations of which the said E. L. Harper was a member or principal owner, and to the said Whitely, Fassler & Kelly, as well as the moneys, drafts and other obligations of said company, hereinbefore alleged to have been embezzled and misappropriated by the said E. L. Harper and Benjamin E. Hopkins, were, to a large extent, used and lost by the said E. L. Harper and Benjamin E. Hopkins, with others, in their said speculations in wheat.

Complainant further says that the said E. L. Harper, in connection with the said Ammi Baldwin and Benjamin E. Hopkins, had been theretofore, and for many years prior to the transactions in this petition alleged, engaged in excessive and reckless speculations in wheat and other commodities, and were well known to the president and directors of said association to be excessive and reckless speculators, and wholly unfit to have the charge, management and control of the moneys, assets and affairs of the said The Fidelity National Banking Association; and complainant avers that by reason of said facts and the knowledge thereof, the said president and directors were put upon inquiry as to the management of the affairs of said banking association, and the safe keeping and investment of its moneys and other properties, during the whole time, during which the money of said association was being loaned and embezzled and misappropriated as hereinbefore set forth, yet the said president and the said directors, and each of them, in gross and willful disregard of their duty as such directors, wholly failed to exercise the slightest diligence, or make the slightest investigation of the conduct of the business of said bank; and that any investigation of the affairs of said bank, or examination of its books and of the evidences of indebtedness held by said bank, would have disclosed to the said president, or either of said directors, that the moneys of said bank were being loaned, and liabilities to said bank were being contracted, in violation of the law, and that the affairs of said bank were being mismanaged and its moneys and assets were

being embezzled and misappropriated in the manner hereinbefore set forth; and that the exercise of proper care and diligence in the discharge of their duty as president and as such directors, would have prevented the losses described to said banking association.

24. Complainant further avers, that on the 16th day of May, A. D. 1887, the said association, professing to comply with the act
286 of Congress requiring reports exhibiting the resources and liabilities of national banking associations to be made to the Comptroller of the Currency, did make a report to the Comptroller of the Currency of the resources and liabilities of said association on the 13th day of May, 1887, as follows, to wit:

Report of the Condition of the Fidelity National Bank at Cincinnati, in the State of Ohio, at the Close of Business on the 13th Day of May, 1887.

Resources.

Loans and discounts		$4,303,021 25
Overdrafts		315 42
U. S. bonds to secure circulation, par value, four per cent		100,000 00
U. S. bonds to secure deposits, par value, four per cent		340,000 00
U. S. bonds on hand, par value, four per cent		18,050 00
Other stocks and bonds on hand, market value		18,122 50
Furniture and fixtures		11,927 95
Current expenses and taxes paid		39,475 86
Premiums on bonds for circulation, market value	$29,000 00	
Premiums on other United States bonds, market value	104,834 00	
		133,834 00
Due from approved reserve agents	376,105 78	
Due from other nat'l banks	443,227 31	
Due from private banks and bankers	125,592 13	
		944,925 22
Checks and cash items	5,613 80	
Exchange for clearing-house	73,743 45	
Bills for other banks	153,120 00	
Nickels and cents	73 49	
Trade dollars	306 00	
Gold coin	57,324 50	
Silver coin	25,683 20	
Silver treasury certificates	226,310 00	
Legal-tender notes	630,000 00	
Five per cent. redemption fund	4,500 00	
		1,176,674 44
Total		$7,086,346 64

287 Liabilities.

Capital stock paid in		$1,000,000 00
Surplus fund		50,000 00
Undivided profits		79,282 57
Circulating notes from comptroller		90,000 00
Individual deposits	$2,387,647 79	
Demand certificates on deposits	29,386 29	
Certified checks	7,433 71	
Cashier's checks outstanding	50,854 12	
U. S. deposits	300,000 00	
Due to national banks	2,213,545 19	
Due to bank and bankers	878,196 97	
		5,867,064 07
Total		$7,086,346 64

STATE OF OHIO, *Hamilton County,* } *ss*:

I, Ammi Baldwin, cashier of the above-named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

AMMI BALDWIN, *Cashier.*

Sworn and subscribed before me this 16th day of May, 1887.

A. W. GOLDSMITH,
Notary Public, Hamilton County, Ohio.

Correct.
Attest:

E. L. HARPER,
HENRY POGUE,
WM. H. CHATFIELD,
Directors.

25. The complainant avers, that the said statement was sworn to by the said Ammi Baldwin, as cashier, before A. W. Goldsmith, a notary public thereunto duly authorized, and was attested as correct by the said E. L. Harper, Henry Pogue and William H. Chatfield; the complainant further says, that the foregoing statement was false in fact, in that among the resources of said banking association, there was not due from—

Approved reserve agents the sum of	$376,105 78
Nor due from other national banks	443,227 31
Nor did said banking association have bills of other national banks	25,683 20
Nor gold coin in the sum of	57,324 50
Nor silver coin in the sum of	25,683 20
Nor silver Treasury certificates in the sum of	226,310 00
Nor legal-tender notes in the sum of	630,000 00

288 On the contrary, the complainant avers, there was in fact among the resources of said banking association at the close of business on the 13th day of May, 1887, only $404,979.76 in money,

including nickels and cents, trade-dollars, gold coin, silver coin, silver Treasury certificates and legal-tender notes.

26. And complainant avers that the said false report, after its return to the Comptroller of the Currency, as aforesaid, was caused by the said president and board of directors of said banking association, to be published in the daily papers in the city of Cincinnati; and complainant further avers, that the slightest examination of said report and of the books and accounts of said banking association, would have disclosed to the said president and board of directors, that said report was wholly false and its resources at that time, and would have disclosed to said board of directors that the affairs of said bank were being mismanaged, and its moneys and assets misappropriated and squandered as hereinbefore set forth. And complainant avers, that by reason of said false report and the publication thereof, many depositors and others became creditors of said banking association.

27. And complainant further avers, that before the transactions and dealings hereinbefore set forth the said banking association, had, and did, a large and profitable business, that was of great value to the said association and its shareholders, but that by reason of the mismanagement of its affairs, by the said defendants, the misappropriation of its means and unlawful loaning of its moneys, as hereinbefore described, and the negligence and misconduct of its officers and board of directors and each of them as aforesaid, the said banking association became wholly insolvent and its legitimate business was completely wrecked and lost, so that its assets and effects, including the liabilities of its stockholders as provided by law, are wholly inadequate to the discharge of the debts and liabilities of said banking association to its depositors and other creditors, which amount in the aggregate to more than five millions of dollars.

28. In consideration whereof, the complainant prays, that the said respondents may appear and answer all and singular the matters and things hereinbefore set forth, and that the court will cause an account to be taken of the loss and damage to said banking association, its shareholders and creditors, sustained by reason of the unlawful acts, misconduct and negligence of the said respondents and each of them as hereinbefore set forth, and that a judgment and decree of this court may be rendered against the said respondents and each
289 of them in his personal and individual capacity for said loss and damage as aforesaid, as the same may be found by this court, and that this complainant may obtain such other and further relief as to this honorable court may seem meet or as equity may require; and your complainant further prays that your honors will grant unto the complainant, the writ of subpœna issuing out of and under the seal of this court, to be directed to the said respondents, Briggs Swift, E. L. Harper, Wm. H. Chatfield, Henry Pogue, Albert P. Gahr, James H. Mathews, Eugene Zimmerman and Ammi Baldwin and Benjamin E. Hopkins, commanding them and each of them by a certain day and under a certain penalty therein named, to appear before your honors in the circuit court of the United States, for the southern district of Ohio, western division, then and

there to answer the premises and abide the order and decree of the court.

E. W. KITTREDGE,
W. B. BURNET,
Solicitors for Complainant.

United States Circuit Court, Southern District of Ohio, Western Division.

DAVID ARMSTRONG, Receiver, etc., *vs.* BRIGGS SWIFT, ALBERT H. CHATFIELD, and FREDERICK Gilbert, Executors of William H. H. Chatfield, Deceased; Henry Pogue, Eugene Zimmerman, E. L. Harper, J. H. Mathews, and A. P. Gahr, Survivors.	No. 4054.

And now comes David Armstrong, the plaintiff in this cause, and states that the defendants, Briggs Swift, the executors of William H. Chatfield, Henry Pogue and Eugene Zimmerman have made a written proposition to him to pay the sum of four hundred and fifty thousand dollars in full settlement and satisfaction by way of compromise of matters and claims in controversy in this cause against them a copy of which proposition is herewith filed and made a part of this petition.

Plaintiff further states that said proposition has been submitted to the Comptroller of the Currency and its acceptance recommended by plaintiff and also by his attorneys.

290 Said proposition has also received the approval of a number of the largest creditors of the said Fidelity national bank. Said proposition has been fully considered by the said Comptroller of the Currency, and he has authorized this plaintiff to apply to this court for authority to accept and consummate said offer of settlement after the creditors of said Fidelity national bank have had notice of the filing of this petition, and have had an opportunity to be heard on the question of its acceptance—a copy of which authority is herewith filed as part of this petition.

Plaintiff states that he believes it to be for the interest of the trust represented by him that the said offer should be accepted and he, therefore, asks this court to order that the said application be heard on the day and hour to be fixed by this court; and that on such hearing this plaintiff be authorized to accept and consummate such offer of compromise, and for such other and further order in the premises as may be necessary and proper.

DAVID ARMSTRONG,
Receiver of the Fidelity National Bank of Cincinnati,
By KITTREDGE & WILBY,
JOHN W. HERRON,
His Attorneys.

Copy.

TREASURY DEPARTMENT,
OFFICE OF THE COMPTROLLER OF THE CURRENCY,
WASHINGTON, D. C., *March* 7, 1890.

David Armstrong, Esq., receiver of the Fidelity national bank, Cincinnati, Ohio.

SIR: I have carefully considered the memorandum, under date 4th inst. with respect to the compromise of a suit against the late directors of the Fidelity national bank, which was handed to me in person.

In view of the statements set forth as to the financial condition of each and every one of the defendants in the bill, and in view of other considerations also set forth and discussed orally with yourself and counsel, I will interpose no objection to your going before the court in the usual way with a petition setting forth all necessary facts, stating that many of the largest creditors of the trust
291 have given their consent in writing, and asking the court for an order, after creditors have been given a reasonable notice of the petition and day of hearing, under which you may proceed to effect a settlement in accordance with the terms submitted to, or as modified by the court.

Enclosure returned herewith.

Very respectfully, (Signed) E. S. LACEY,
Comptroller.

Handed to John W. Herron in person.

Copy.

Ramsey, Maxwell & Ramsey, attorneys-at-law.

CINCINNATI, *February* 24, 1890.

David Armstrong, Esq., receiver of the Fidelity national bank, Cincinnati, Ohio:

We hereby propose a compromise in settlement of all claims and demands asserted by you in the suit brought by you against Briggs Swift *et al.*, late directors of the Fidelity national bank, being No. 4054, in equity, U. S. circuit court, S. D. Ohio, upon the following terms.

The payment to you of the sum of $450,000.00 in full of all said demands. The sum to be paid by the several defendants—Swift, Pogue, Chatfield's estate, and Zimmerman, in proportions fixed between themselves.

Yours very truly,

(Signed) BRIGGS SWIFT,
By RAMSEY, MAXWELL & RAMSEY,
Ex'rs of Wm. H. Chatfield, Dec'd,
By JORDANS & JORDANS AND
RAMSEY, MAXWELL & RAMSEY.
EUGENE ZIMMERMAN,
By HERBERT JENNEY &
RAMSEY, MAXWELL AND RAMSEY.
HENRY POGUE,
By THOMAS McDOUGALL, *Att'y.*

I hereby recommend to the Comptroller of the Currency that the above offer to compromise the suit mentioned be accepted.

March 4, 1890.

(Signed) D. ARMSTRONG, *Rec.*

Approved:

KITTREDGE & WILBY,
JOHN W. HERRON,
Attorneys for Receiver.

March 4, 1890.

292 SOUTHERN DISTRICT OF OHIO, *ss:*

A true copy.

Attest:

[SEAL.]

B. R. COWEN, *Clerk*,
By JANIE W. F. COWEN,
Deputy Clerk.

Endorsed: No. 4054. United States circuit court, southern district of Ohio, western division. David Armstrong, rec'r, *vs.* Briggs Swift *et al.* Application for authority to compromise. Filed M'ch 12, 1890. B. R. Cowen, clerk. Fees, $1.55, paid. B. R. Cowem, clerk. Kittridge & Wilby, Jno. W. Herron, attorneys.

THE UNITED STATES OF AMERICA, *Southern District of Ohio, Western Division,* } *ss:*

At a stated term of the circuit court of the United States of America, within and for the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms at the city of Cincinnati, Ohio, in said district, on the first Tuesday of February, being also the fourth day of that month, in the year of our Lord one thousand and eight hundred and ninety, and of the Independence of the United States of America the one hundred and fourteenth.

Present, the Honorable George R. Sage, district judge.

On Wednesday, the 12th day of March, A. D. 1890, among the proceedings had were the following, to wit:

DAVID ARMSTRONG, Receiver of the Fidelity National Bank,
vs.
BRIGGS SWIFT *et al.*

This day came the complainant and filed an application for authority to accept an offer of compromise of the above case as to Briggs Swift, the executors of William H. Chatfield, Henry Pogue and Eugene Zimmerman, and upon said application it is now ordered that the same be heard by this court on Tuesday, April 15, 1890, at 9.30 o'clock a. m., or as soon thereafter as will be convenient for the court; and that notice of said hearing be given to
293 all the creditors of said Fidelity national bank, who have proved their claims, or whose claims are in dispute, and to

all stockholders of record, by depositing in the mail, by said complainant, duly addressed to each of said creditors and stockholders, on or before March 15, 1890, notice of the time of the hearing of the said application as above set forth.

THE UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, Western Division, }

I, Benjamin R. Cowen, clerk of the circuit court of the United States of America, within and for the division and district aforesaid, do hereby certify that the foregoing entry is truly taken and correctly copied from the journal of said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the city of Cincinnati, Ohio, this 18th day of September, A. D. 1895.

B. R. COWEN, *Clerk*,
By JANIE W. F. COWEN,
Deputy Clerk.

[SEAL.]

Endorsed: No. 4054. United States circuit court, southern district of Ohio, western division. David Armstrong, rec'r, *vs.* Briggs Swift *et al.* Certified copy of entry. Filed M'ch 12, 1890. B. R. Cowen, clerk. Fees, 75 cents, paid. B. R. Cowen, clerk.

THE UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, Western Division, }

At a stated term of the circuit court of the United States of America, within and for the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms at the city of Cincinnati, Ohio, in said district, on the first Tuesday of April, being also the first day of that month, in the year of our Lord one thousand and eight hundred and ninety, and of the Independence of the United States of America the one hundred and fourteenth.

Present, the Honorable George R. Sage, district judge.

294 On Wednesday, the 16th day of April, A. D. 1890, among the proceedings had were the following, to wit:

DAVID ARMSTRONG, Receiver, }
vs. } No. 4054.
BRIGGS SWIFT ET AL. }

This day this cause came on to be heard upon the application of the complainant, David Armstrong, as receiver of the late Fidelity national bank, for authority to accept the offer of Briggs Swift, the executor of Wm. H. Chatfield, deceased: Eugene Zimmerman and Henry Pogue, defendants herein, to settle and compromise this cause and claim against them, by the payment in satisfaction and compromise thereof of the sum of four hundred and fifty thousand dollars ($450,000.00), and the court having considered the same, finds that due notice of the said application and its pendency and the

time of hearing the same was given to creditors and stockholders of said late Fidelity national bank, as required by the order of this court, and no creditor or stockholder having shown good cause to the court why the said compromise should not be made, and the prayer of said application granted, it is therefor- ordered and adjudged by the court that the settlement and compromise as asked in said application be granted and allowed, and that the said receiver, complainant herein, be, and he is hereby, authorized to accept and consummate said offer of four hundred and fifty thousand dollars, from said defendants hereinbefore named, in compromise, settlement and satisfaction of all claims at issue in this cause against said Briggs Swift, the estate of W. H. Chatfield, deceased; Eugene Zimmerman and Henry Pogue, and to receive said sum from them, together with interest until paid, on so much thereof as may not be paid within thirty days from and after the entry of this order, and upon the performance of this compromise and the payment in full of said sum, as aforesaid, they, the said Briggs Swift, estate of W. H. Chatfield, deceased; Henry Pogue and Eugene Zimmerman, shall be discharged from all liability for any claim or cause of action at issue in this cause. But this compromise and the foregoing order shall be without prejudice to the further prosecution of this cause against the other defendants, not parties to this compromise, and without prejudice to the liability, if any, of such other defendants, or either of them.

295 And as to costs, the court order- that the taxable costs of the cause to date, excluding docket fees, which are by agreement waived, shall be paid, one-half by the receiver and one-half by the compromising defendants aforesaid, each party having credit for such of said costs as have been paid by them respectively.

THE UNITED STATES OF AMERICA, *Southern District of Ohio, Western Division,* } *ss:*

I, Benjamin R. Cowen, clerk of the circuit court of the United States of America, within and for the division and district aforesaid, do hereby certify that the foregoing entry is truly taken and correctly copied from the journal of said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at the city of Cincinnati, Ohio, this 17th day of September, A. D. 1895.

B. R. COWEN, *Clerk,*
By JANIE W. F. COWEN,
Deputy Clerk.

Endorsed: No. 4054. United States circuit court, southern district of Ohio, western division. David Armstrong, rec'r, *vs.* Briggs Swift *et al.* Certified copy of entry. Filed Apr. 16, '90. B. R. Cowen, clerk. Z., 25. Fees, $1.05, paid. B. R. Cowen, clerk.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, } *ss*:

At a stated term of the circuit court of the United States of America, within and for the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms at the city of Cincinnati, Ohio, in said district, on the first Tuesday of April being also the first day of that month in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States of America the one hundred and fourteenth.

Present, the Honorable George R. Sage, district judge.

296 On Monday the 19th day of May, A. D. 1890, among the proceedings had were the following, to wit:

DAVID ARMSTRONG, Receiver of the Fidelity National Bank,
vs.
BRIGGS SWIFT, Impleaded, &c.

This cause came on to be heard and on consideration of the same the court finds that the defendants, Briggs Swift, is indebted to the plaintiff on the agreement of compromise heretofore offered by him and accepted by the plaintiff under the authority of this court in the sum of three hundred thousand dollars with interest from the 16th day of May, 1890, and which sum he has failed to pay and that the plaintiff is therefore entitled to a judgment and execution against him for the said sum.

It is therefore ordered and adjudged that the plaintiff recover of the said defendant, Briggs Swift, the said sum and interest as aforesaid and one-half of the costs of this suit as taxed and that execution issue therefor.

This judgment is now rendered without prejudice to any further order in this cause that may become necessary to enforce the said compromise decree as heretofore entered, and all questions, about costs as between said Swift and the other defendants is reserved for future action.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, } *ss*:

I, Benjamin R. Cowen, clerk of the circuit court of the United States of America, within the division and district aforesaid, do hereby certify that the foregoing entry is truly taken and correctly copied from the journal of said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the city of Cincinnati, Ohio, this 18th day of September, A. D. 1895.

B. R. COWEN, *Clerk*,
By JANIE W. F. COWEN,
Deputy Clerk.

Endorsed: No. 4054. United States circuit court, southern district of Ohio, western division. David Armstrong, rec'r, *vs.* Briggs

Swift *et al.* Certified copy of entry. Filed May 19, 1890. B. R. Cowen, clerk. Fees, 75 cents, paid. B. R. Cowen, clerk.

297 THE UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, Western Division, }

At a stated term of the circuit court of the United States of America, within and for the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms at the city of Cincinnati, Ohio, in said district, on the first Tuesday of April, being also the seventh day of that month, in the year of our Lord one thousand eight hundred and ninety-one and of the Independence of the United States of America the one hundred and fourteenth.

Present, the Honorable George R. Sage, district judge.

On Wednesday, July 1, A. D. 1891, among the proceedings had were the following, to wit:

DAVID ARMSTRONG, Receiver, }
vs. } No. 4054.
BRIGGS SWIFT. }

This day came the plaintiff and Joseph C. Thoms and Herbert L. Brenneman, executors of Briggs Swift, deceased, and this day came also Mary S. Thoms, wife of said Joseph C. Thoms, and Eunice S. Brenneman, wife of said Herbert L. Brenneman, being the sole heirs-at-law and devisees of said Briggs Swift, deceased, and by consent of all said parties the judgment herein rendered is this day revived against the said heirs and executors. And thereupon the plaintiff, David Armstrong, receiver, acknowledged satisfaction of said judgment except as to the sum of $150,000 and it was agreed between the parties that the amount remaining due and unpaid on account thereof is the sum of $150,000 with interest from July 1, 1891, and execution is awarded therefor.

Thereupon came the said David Armstrong, receiver, and filed with the clerk an assignment of said judgment unto the Union Central Life Insurance Company of Cincinnati, Ohio.

J. C. THOMS.
MARY S. THOMS.
EUNICE S. BRENNEMAN.
H. L. BRENNEMAN.

298 THE UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, Western Division, }

I, Benjamin R. Cowen, clerk of the circuit court of the United States of America, within and for the division and district aforesaid, do hereby certify that the foregoing entry is truly taken and correctly copied from the journal of said court.

In testimony whereof, I have hereunto set my hand and affixed

the seal of said court, at the city of Cincinnati, Ohio, this 17th day of September, A. D. 1895.

B. R. COWEN, *Clerk*,
[SEAL.] By JANIE W. F. COWEN,
Deputy Clerk.

Endorsed: No. 4054. United States circuit court, southern district of Ohio, western division. Armstrong, receiver, *vs.* Swift *et al.* Certified copy of entry. Filed July 1, 1891. B. R. Cowen, clerk. Fees, 75 cents, paid. B. R. Cowen, clerk.

THE UNITED STATES OF AMERICA, } *ss*:
Southern District of Ohio, Western Division, }

At a stated term of the circuit court of the United States of America, within and for the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms at the city of Cincinnati, in said district, on the first Tuesday of October being also the second day of that month in the year of our Lord one thousand eight hundred and ninety-four, and of the Independence of the United States of America the one hundred and nineteenth.

Present, the Honorable George R. Sage, district judge.

On Friday the fourth day of January, A. D. 1895, among the proceedings had were the following, to wit:

Entry of Satisfaction and Dismissal as to the Estate of William H. Chatfield.

DAVID ARMSTRONG, Receiver, }
vs.
BRIGGS SWIFT ET AL. }

Now comes David Armstrong, receiver, complainant herein,
299 and acknowledged the receipt of one hundred thousand dollars and interest from the 16th day of April, 1890, paid to him by Albert H. Chatfield and Frederick Gilbert, executors of the last will and testament of William H. Chatfield, deceased, in full satisfaction of the proportionate share assumed by William H. Chatfield in the order of compromise herein entered on said 16th day of April in the year 1890; and thereupon, pursuant to said order of compromise, the complainant herein acknowledges satisfaction in full of all the latters in controversy herein, so far as they relate to the executors of the estate of said William H. Chatfield, deceased, and the bill of complaint is accordingly dismissed as against said executors.

This entry is made without prejudice to the proceeding as against other defendants not herein named.

THE UNITED STATES OF AMERICA, } *ss*:
Southern District of Ohio, Western Division, }

I, Benjamin R. Cowen, clerk of the circuit court of the United States of America, within and for the division and district aforesaid,

do hereby certify that the foregoing entry is truly taken and correctly copied from the journal of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Cincinnati, Ohio, this 17th day of September, A. D. 1895.

B. R. COWEN, *Clerk*,
By JANIE W. F. COWEN,
Deputy Clerk.

Endorsed: No. 4054. United States circuit court, southern district of Ohio, western division. Armstrong, receiver, *vs.* Swift *et al.* Certified copy of entry. Filed Jan. 4, 1895. B. R. Cowen, clerk. Fees, 75 cents, paid. B. R. Cowen, clerk.

In the Circuit Court of the United States.

DAVID ARMSTRONG, Receiver of the Fidelity National Bank,
vs.
BRIGGS SWIFT ET AL. } No. 4054.

Now comes Catherine Brooks, lately adjudged by the court
300 as a stockholder to the number of 13 shares, upon which she has at this term (April term), 1890, been adjudged to pay and has paid $1,387.10 *dollars*, and is liable for the costs of the said suit No. 4280. And she says that she purchased her said stock on the 18th day of May, 1887, from the said Fidelity national bank, paying therefor the sum of $2,015.00, and that in view of her said claim aforesaid, protests against the settlement and compromise herein proposed, and enters her objection thereto.

PORTER AND RENDIGS AND
WM. E. BROOKS,
Attorneys for Catherine Brooks.

SOUTHERN DISTRICT OF OHIO, *Western Division*, } *ss:*

A true copy of the original on file in this office.
Attest: B. R. COWEN, *Clerk*,
By ROB'T C. GEORGI, *Deputy.*

Endorsed: 4054. U. S. circuit court. D. Armstrong, receiver of the Fidelity national bank, *vs.* Briggs Swift *et al.* Protest against compromise and settlement. Filed Apr. 15, 1890. B. R. Cowen. Porter & Rendigs and Wm. E. Brooks, att'y- for C. Brooks.

In the Circuit Court of the United States.

DAVID ARMSTRONG, Receiver of the Fidelity National Bank,
vs.
BRIGGS SWIFT ET AL. } No. 4054.

Now comes Oscar I. Frank, a stockholder of said bank, who paid his assessment in full under written protest, being the owner of

twenty shares, five shares being bought on the 9th day of June, and five on the 13th day of June, 1887, paying therefor $—, the market price at that time, and that in view of his said claims aforesaid, protests against the settlement and compromise herein proposed, and enters his objection thereto.

SOUTHERN DISTRICT OF OHIO, *Western Division,* } *ss:*

A true copy of the original on file in this office.
Attest: B. R. COWEN, *Clerk,*
By ROB'T C. GEORGI, *Deputy.*

301 Endorsed: No. 4054. In the circuit court of the United States. David Armstrong, receiver of the Fidelity national bank, *vs.* Briggs Swift *et al.* Protest of O. S. Frank. Filed Apr. 15, 1890. B. R. Cowen.

In the Circuit Court of the United States.

DAVID ARMSTRONG, Receiver of the Fidelity National Bank, *vs.* BRIGGS SWIFT ET AL. } No. 4054.

Now comes Richard Mallay, lately adjudged by this court to be a stockholder of the Fidelity national bank, and the holder of one hundred and seventy-five (175) shares thereof, of the face value of $17,500.00, and he having paid his assessment thereon in the sum of seventeen thousand five hundred ($17,500.00) dollars to the receiver of the Fidelity national bank, and also as a depositor of the said bank in the sum of $458.00, less 35 per cent. dividend on said amount of $458.00, and enters his protest against the settlement and compromise herein proposed, and enters his objection thereto.

SOUTHERN DISTRICT OF OHIO, *Western Division,* } *ss:*

A true copy of the original on file in this office.
B. R. COWEN, *Clerk,*
By ROB'T C. GEORGI, *Deputy.*

Endorsed: 4054. In the circuit court of the United States. David Armstrong, receiver of the Fidelity national bank, *vs.* Briggs Swift *et al.* Protest of Richard Mallay against acceptance of compromise. Filed Apr. 15, 1890. B. R. Cowen. F. J. Dorger, att'y for Richard Mallay.

302

E. L. Harper.

Date. 1886.		Registration Nos.	No. trans.	No. certif.	
Feb'y	24		...	1	1,000
	"		...	2	1,000
	"		...	3	1,000
	"		...	4	10,000
	"		...	5	10,000
	"		...	6	10,000
	"		...	7	10,000
	"		...	8	10,000
	"		...	9	1,000
	"		...	10	1,000
	"		...	12	45,000
	25		...	42	2,000
	30		259	289	8,600
	"		259	290	10,000
	31		268	292	400
April	2		289	295	6,100
	3		...	302	1,900
	20		...	319	400
	22		...	327	200
	7		37	310	2,000
	13		305	313	100
	14		221	315	16,000
	20		319	...	3,100
	"		315		
	"		315	...	8,000
	21		322	...	3,000
	22		325	...	700
	23		320	...	12,700
	26		113	...	2,000
	28		333	...	7,700
	"		147	...	5,000
	29		44	...	700
May	6		343	...	7,200
	14		356	...	6,700
	22		91	...	500
	"		91	...	500
June	16		99	...	1,000
	"		99	...	2,500
	22		137	...	10,000
	"		31		
	"		118		
	"		130		
	"		155		
	"		194		
	"		308		

Date. 1886.		Registration Nos.	No. trans.	No. of certif.	
April	2		294	289	8,600
	"		295		
	3		300	295	6,100
	"		301		
	"		301	302	1,900
	20		320	319	400
	"		321		
	"		318	315	16,000
	"		321		
	"		322	292	400
	"		323		
	"		321	42	2,000
	21		325	322	8,000
	"		324		
	"		316	325	3,000
	"		328		
	2		316	327	200
	23		329	328	700
	"		329	310	2,000
	28		342	333	12,700
	"		343		
May	3		347	346	700
	6		350	343	7,700
	"		356		
	14		358	356	7,200
	"		363		
	18		361	290	10,000
June	1		368	344	5,000
	"		369		
	"		369	367	500
	"		369	366	500
	"		369	336	2,000

E. L. Harper.

Date. 1886.		Registration Nos.	No. trans.	No. of certf.	
July	14		133	388	250 00
	"		351		
	"		7		
	16		8	391	12 00
	"		66		
	17		245	392	250 00
	"		4		
	"		6	393	100 00
	"		30		
	"		5	394	100 00
	"		41	395	50 00
	"		211		
	"		211	396	30 00
	19		272	397	100 00
	"		273		
	"		329	398	50 00
	"		88	400	20 00
	23		391	407	9 00
	"		407	410	4 00
	27		18	412	200 00
	"		1	413	20 00
	"		10		
	"		23	414	30 00
	"		9		
	"		377	415	25 00
	"		396	416	50 00
	"		400		

Date. 1886.		Registration Nos.	No. trans.	No. of certf.	
July	14		388	7	100 00
	"		388	8	100 00
	16		389	313	1 00
	17		392	4	100 00
	"		392	6	100 00
	"		394	5	100 00
	23		406	391	12 00
	"		407		
	"		408	407	9 00
	"		409		
	26		410	395	50 00
	"		411		
	27		413	1	10 00
	"		413	10	10 00
	"		414	2	10 00
	"		414	3	10 00
	"		414	9	10 00
	"		415	377	25 00
	"		416	396	30 00
	"		416	400	20 00
	"		417	415	25 00
Aug.	6		418	425	23 00
	"		427		
	9		426	410	4 00
	"		428		
	"		429		

303					
	"	415	417	10 00	
	"	415	418	15 00	
	29	119	419	50 00	
	"	124			
	31	405	420	25 00	
	"	68	421	40 00	
Aug.	3	234	422	25 00	
	5	179	423	100 00	
	"	364	424	100 00	
	6	372			
	" 373	370	425	23 00	
	" 129	371			
	"	389	426	50 00	
	" 341	304			
	"	380			
	" 425	425	427	5 00	
	"	103			
	9	401	428	50 00	
	"	287			
	"	410	429	3 00	
	"	410			
	21	161	432	35 00	
	"	177			
Sept.	1	57	433	20 00	
	"	57	434	10 00	
	"	57	435	1 00	
	3	15	436	100 00	
	"	15	437	100 00	
	"	15	438	100 00	
	"	16			
	"	16	439	100 00	
1886.					
Sept.	3	16	440	10,000	
	"	197	444	2,000	
	"	439	450	500	
	6	233	457	1,500	
	7	448	460	1,000	
	15	437	462	5,000	
	17	178	465	2,500	
	20	36			
	27	374	468	4,000	
Oct.	1	470	472	700	
	4	270	475	5,000	
	"	472	476	400	
	6	12	481	40,000	
	"	12	482	5,000	
	7	84	485	1,200	
	12	326	489	2,500	
	"	485			
	20	126	495	2,000	
	29	63	501	5,000	
	"	221			
	"	256	502	300	
	"	256			
Nov.	2	263	505	5,000	
	"	387			
	"	442			
	"	224			
	"	387	506	100	
	4	61	512	3,000	
	15	236	516	1,500	
	19	294	518	2,500	
Dec.	7	59	522	1,000	
	24	432	529	500	
	29	493	530	10,000	
	"	349			
	"	51	531	1,200	
	30	312	533	500	
1887.					
Jan'y	4	77	535	1,500	
	13	240	544	4,000	
	"	214			
	"	241	545	600	
	23	463	549	1,000	
Mar.	1	271	560	2,500	

1886.					
Sept.	3	446	440	100 00	
	6	447			
	"	448	439	100 00	
	"	449			
	9	450			
	"	452	438	100 00	
	"	453			
	"	453	435	1 00	
	"	453	433	20 00	
	"	453	429	3 00	
	"	453	427	5 00	
	15	456	436	100 00	
	"	457			
	"	459	444	20 00	
	16	461	451	15 00	
	17	463	437	100 00	
	"	462			
	23	466	450	5 00	
Oct.	4	473	460	10 00	
	"	476	472	7 00	
	"	474			
	6	478	468	40 00	
	"	479			
	"	481	12	450 00	
	"	482			
	7	483	465	25 00	
	12	489	485	12 00	
Nov.	2	507	501	50 00	
	"	508	475	50 00	
	"	509	462	50 00	
	11	514	489	25 00	
	19	517	506	1 00	
	"	517	476	4 00	
Dec.	7	521	516	15 00	
	"	521	502	3 00	
	11	525	518	25 00	
	24	528	432	35 00	
	"	529			
1887.					
Jan'y	8	537	321	31 00	
	10	539	422	25 00	
	"	540			
	"	541	418	15 00	
	"	541			
Feb'y	24	542	535	15 00	
	"	551			
	"	551	545	6 00	
	"	552	393	100 00	
	25	553	424	100 00	
	"	554			
Mar.	1	565	533	5 00	
	2	566	434	10 00	
	"	566	522	10 00	

304

1887.					
Mar.	16		237	579	300
	29		218	600	300
	31		284	615	1,000
	"		579		
April	1		47	620	3,000
	"		483		
	4		406	623	100
	"		190	625	700
	7		55	638	12,000
	"		355		
	"		355	639	13,000
	"		28		
	"		28	640	10,000
	"		167		
	"		172	641	5,000
	"		526		
	"		526	642	5,000
	"		54		
	13		386	645	2,000
	15		648	652	1,000
	19		87	656	1,000
	21		27	658	5,000
May	4		93	661	500
	"		660	663	1,500
	17		78	667	500
	18		593	670	500
	26		531	716	6,000
	"		625		
	"		382		
	"		629		
	"		225		
	"		620		
	28		474	726	200
1887.					
May	26		...	713	40,000
			...	714	40,000
			...	715	40,000
		See old stock	694	716	33,400

1887.					
Mar.	3		567	419	50 00
	"		568	423	100 00
	"		569		
	"		570	530	100 00
	"		571		
	"		572	549	10 00
	"		572	421	40 00
	"		573	428	50 00
	"		574	426	50 00
	7		576	529	5 00
	31		615	579	3 00
	"		617	600	3 00
Apr.	5		636	615	10 00
	6		637	505	50 00
May	4		662	661	5 00
	18		668	667	5 00
	26		716	620	30 00
	"		716	625	7 00
	"		716	531	12 00
	31		734	670	5 00
June	13		777	726	2 00

J. H. Mathews.

Date.		Registration Nos.	No. trans.	No. of certf.	
1886.					
Feb'y	24		...	13	25,000
	"		...	14	25,000
	"		...	15	25,000
	"		...	16	25,000
Sept.	4		440	446	10,000
	9		427	453	8,900
	"		438		
	"		435		
	15		433	456	8,000
	"		429		
	"		436	457	2,000
	"		436		
Dec.	4		188	519	10,000
	"		261		
	"		209		
	"		361	520	10,000
	7		283	521	10,000
	"		516		
	"		502		
	11		379	523	10,000
	"		59		
	"		13	524	10,000
	"		13		
	"		13	524	10,000
	"		125		
	"		108		
	"		518		
	24		332	528	10,000
	"		487		
	"		503		
	"		432		
1887.					
Jan'y	10		422	541	1,000
	"		418		
Mar.	19		14	580	20,000
	"		14	581	5,000

Sept.	3		436	15	250 00
	"		437		
	"		438		
	"		438	16	250 00
	"		439		
	"		440		
	15		459	457	20 00
Dec.	11		523	13	250 00
	"		524		
	"		525		
1887.					
Mar.	19		580	14	250 00
	"		581		
May	23		697	519	100 00
	"		695	580	200 00
	"		696		
	"		698	587	50 00
	28		724	520	100 00
	"		725		

305					
	23	.....	168	584	5,000
	"	.....	171		
	"	.....	153		
	"	.....	207	585	5,000
	"	.....	585		
	"	.....	473		
	"	.....	239	586	5,000
	"	.....	239	587	5,000
	"	.....	532	588	5,000
	"	.....	539		
	31	.....	48	613	8,000
April	4	.....	331	633	5,000
	6	.....	505	637	5,000
	19	.....	165	655	5,000
	"	.....	87		
May	23	.....	580	695	10,000
	"	.....	580	696	10,000
	"	.....	519	697	10,000
	"	.....	587	698	10,000
	"	.....	564		
	28	.....	520	724	5,000
	"	.....	520	725	5,000
	31	See new stock.....	212	731	2,500
May	31	See old stock.....	.....	731	2,500

A. P. Gahr.

Date.		Registration Nos.	No. trans.	No. of certf.	
1886.					
Feb'y	24	.....	.....	17	30,000
"		.....	.....	18	20,000
Ap'l	20	.....	292	323	3,400
"		.....	128		
"		.....	220		
"		.....	42		
1887.					
Jan'y	10	.....	418	542	1,000
Mar.	1	.....	458	561	5,000
"		.....	69	562	5,000
"		.....	69	563	5,000
"		.....	452	564	5,000
"		.....	139		
"		.....	139	565	5,000
"		.....	127		
"		.....	365		
"		.....	533		
	3	.....	419	567	5,000
"		.....	423	568	5,000
"		.....	423	569	5,000
"		.....	530	570	5,000
"		.....	530	571	5,000
"		.....	549	572	5,000
"		.....	421		
"		.....	428	573	5,000
"		.....	426	574	5,000
Apr.	4	.....	368	634	8,000
"		.....	369		
"		.....	551	635	5,000
	13	.....	121	644	8,000
"		.....	386		

Date.		Registration Nos.	No. trans.	No. of certf.	
1886.					
July	27	.....	412	18	20,000
Oct.	29	.....	497	323	3,400
1887.					
May	23	.....	698	564	5,000

306 The United States Circuit Court, Southern District of Ohio, Western Division.

THE CHEMICAL NATIONAL BANK OF NEW YORK
vs.
DAVID ARMSTRONG, Receiver of the Fidelity National Bank of Cincinnati, Ohio.

UNITED STATES OF AMERICA,
Southern District of Ohio, } *ss:*

Pursuant to the foregoing commission, I hereby certify that on the eighteenth day of September, 1895; the nineteenth day of September, 1895; the eleventh day of November, 1895; the third day of February, 1896; and the fourth, fifth and sixth days of May, 1896,

before me, Effie V. Ryan, special examiner, appointed under an order of this court, dated the seventeenth day of September, 1895, at the office of David Armstrong, receiver of the Fidelity national bank, room No. 9, Masonic temple, Cincinnati, Ohio; at the office of Hon. William Worthington, in Wiggins block, Cincinnati, Ohio; in room 310 Government building; at the office of Hon. John W. Herron, in the United Bank building, Cincinnati, Ohio, and at the office of Henry Pogue, Esq., No. — West Fourth street, Cincinnati, Ohio, personally appeared Wm. B. McCauslen, M. M. White, Franklin Alter, Charles A. Hinch, Sol. P. Kineon, W. A. Goodman, W. S. Rowe, H. C. Yergason, Griffith P. Griffith, J. D. Hearne, Albert P. Gahr, as witnesses on behalf of the plaintiff; and J. Harry Watters, James H. Mathews, Henry Pogue and Sol. P. Kineon, on behalf of the defendant; and that Hon. William Worthington appeared as counsel for plaintiff; and that Hon. John W. Herron appeared as counsel for defendant; and that said witnesses, being by me first duly cautioned, sworn and affirmed, respectively, to tell the truth, the whole truth and nothing but the truth, deposed and said as appears by the depositions hereto annexed; and I further testify that the said depositions were by me reduced to writing.

I further testify that the said depositions have been retained by me for the purpose of sealing up and directing the same to the clerk of the court, as required by law, and that I am not of counsel or attorney to either of the parties herein; nor am I interested in the event of the cause.

In testimony whereof, I have hereunto set my hand, at the city of Cincinnati, county of Hamilton and State of Ohio, this seventh day of May, A. D. 1896.

EFFIE V. RYAN,
Special Examiner.

307 *Examiner's Fees.*

Reporting and transcribing depositions:

500 folios, at .20	$100 00
Attendance 9 days, at $3	27 00
Swearing 14 witnesses, at .10	1 40
Attaching 29 exhibits, at .10	2 90
Witness' fees, 14, at $1.50	21 00
	$152 30

And afterwards, to wit, on the 13th day of October, A. D. 1896, the following opinion was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Opinion of Judge Sage.

Circuit Court of the United States, Southern District of Ohio, W. D.

THE CHEMICAL NATIONAL BANK OF NEW YORK
vs.
DAVID ARMSTRONG, Receiver of the Fidelity National Bank of Cincinnati.

Upon complainant's appeal the decree of this court in its favor was affirmed as to the amount due as principal, but modified as to the interest. Before the decree of the appellate court was entered the case of Western National Bank *v.* Armstrong, 152 U. S., 346, was decided. Thereupon the defendant, in view of that decision petitioned for a rehearing on a ground of error assigned, but not pressed upon the attention of the court, nor referred to in its decision, to wit, that the court below erred in finding that the Fidelity bank was indebted to the complainant. The rehearing was granted, and resulted in a reversal of the decree below "with leave to parties to adduce further evidence, upon the issue whether the Fidelity bank owes anything to the Chemical bank by virtue of the alleged loan." The loan which was of $300,000, was made by complainant March 2, 1887, upon an application in writing over the signature "E. L. Harper, vice-president," on a letter-head sheet of the Fidelity bank, and dated and mailed at Cincinnati February 28, 1887, as follows: "Enclosed herewith we hand you for cr., our certificate of deposit No. 345, with bills collateral as follows:" (Here was inserted list of collaterals aggregating $326,695.30.) "We desire to keep
308 a large reserve with you, and we trust you will make the rate as low as you proposed some time since."

On the second of March the cashier of the Chemical bank wrote and mailed letter acknowledging receipt of the above and adding "we credit Fidelity national bank $300,000 and shall be considerate as to rate when the loan is paid." The transaction was entered in the call-loan book of the Chemical bank as—

"Loan No. 1070, March 2, 1887. Fidelity national bank $300,000. Receivables $326,695.30."

The directors of the Fidelity bank did not authorize or consent to, or until after the failure of the bank, know of this loan. It was not entered on the books. The book-keeper and general accountant first knew of it after the failure of the Fidelity bank. On the second of March, the date when the loan was made, Harper gave to the general book-keeper a charge ticket and directed him to place it to his credit, which was done. That ticket read as follows: "Credit check, transfer of funds, E. L. H. $300,000. Charge Chemical N. Y." At the same time the charge of $300,000 was made against the Chemical bank. The entire transaction was fraudulent and criminal on the part of Harper, who was then engaged in wrecking the bank for his own speculative purposes.

By the evidence adduced upon the rehearing it is established that

prior to the decision of the Western National Bank *v.* Armstrong it was customary and usual for one national bank to borrow money from another, and that it was regarded by bankers as legitimate and in the line of banking business to do so, without any special authority from the board of directors by resolution or otherwise, nor was such authority ever required by the bank making the loan. The president, vice-president and cashier severally were treated as having authority to make loans on behalf of the bank; in other words, such transactions were recognized as being within the scope of their general duties. Transactions taking the form of the loan involved in this case, some covering large amounts, but none so large as this, are referred to by officers of banks, in their testimony as not infrequent. The cashier of the Chemical bank in his deposition in this cause, given March 12, 1891, years before the decree of Western National Bank *v.* Armstrong, testified that it was customary for one bank to borrow money from another bank in that way, and that such transactions were very common. His language was: "It is a customary way for banks in the West and South to borrow in that manner for several reasons: First, it increased their deposit line, and in the second place they do not have to show a rediscount
309 on a loan, and hence it is a very common thing for loans to be made of that character—a certificate of deposit with a mass of collaterals attached." The president of the Chemical bank having had forty years' experience, testifies that prior to the decision of Western national bank it was a usual thing for one bank to borrow money from another bank, that loans were effected by rediscount of bills receivable, or by the bank's note, secured by collateral, or by a certificate of deposit, that the president, vice-president or cashier acted for the borrowing bank, that no special authority from the directors was ever required and that the decisions of the courts in that State were specific on that point; also that it made no difference as to the amount of the loan. To the same effect is the testimony of the president of the American Exchange Bank of New York, speaking from thirty-three or thirty-four years' experience; also the testimony of the president of the Third national bank, an ex-Comptroller of the Currency at Washington, ex-superintendent of the bank department of the State of New York, and an ex-bank examiner; the cashier of the Importers' and Traders' bank, the president of the First national bank and the president of the Gallatin national bank, all of the city of New York. All this testimony is uncontroverted, and it is quite significant that although Receiver Armstrong was himself an old and experienced banker, it was not until after the decision of Western National Bank *v.* Armstrong that the point was made that the negotiation of the loan upon which this suit is based was outside the ordinary course of business in banking and not within the authority of the line of the duties of the vice-president of the Fidelity bank.

In Western National Bank *v.* Armstrong the answer denied that the complainant had loaned the sum claimed or any other sum to the Fidelity bank, averred that the notes mentioned in the bill made by Gahr and endorsed by Harper were discounted by the complain-

ant for Harper, by whom the proceeds of the discount were received; that the discounted notes were at no time the property of the Fidelity national bank, and that that bank never had any interest in the transaction, and was in no way responsible therefor. Upon the hearing the bill was dismissed by the court below and the dismissal was affirmed by the Supreme Court. The opinion begins with the statement that "whether the transaction of May, 1887, was a discount by the Western National Bank of New York, in favor of E. L. Harper of the four notes made by A. P. Gahr and endorsed by Harper, or was a loan by said bank to the Fidelity national bank,
310 is the question principally discussed in the briefs and oral arguments of the respective parties." Justice Shiras, speaking for the court proceeded: "The theory that the case was that of a simple discount by the New York bank of four promissory notes, made by Gahr and endorsed by Harper, and secured by the assignment by Harper of certificates of 1,600 shares of the stock of the Fidelity national bank, comports with the form of the notes themselves. Such a transaction would have been an ordinary one, and in the course of the usual business of such bank. The letter of May 16, 1887, in which the proposition was made to the New York bank to make the loan was signed by E. L. Harper in his own name, without any official designation." The letter of application for the loan was written on the letter-head paper of the Fidelity bank and the proceeds of the discount were placed to its credit and drawn out by its drafts. It appeared that it was understood by the New York bank that the application came from the Fidelity bank. But it further appeared that the drafts against the proceeds although in the name of the bank were drawn, some by Harper, others by his direction and appropriated by him to his own use, or at least it did not appear "that the bank ever got a penny of the borrowed money or any benefit or advantage whatever by reason of the transaction." The court said that "it could not be pretended that Harper as principal executive officer of the bank had power without authority from the board to bind the bank by borrowing $200,000 at four months' time." The court continued: "It might even be questioned whether such a transaction would be within the power of the board of directors. The powers expressly granted are stated in the eighth section of the national bank act (Rev. Stat., sec. 5136, par. 7): A national bank can "exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security and by obtaining, issuing and circulating notes."

"The power to borrow money or to give notes is not expressly given by the act. The business of the bank is to lend, not to borrow, money; to discount the notes of others, not to get its own notes discounted. Still, as was said by this court in the case of First Nat. Bank v. Nat. Exchange Bank, 92 U. S., 122, 127, 'authority is thus

given in the act to transact such a banking business as is
311 specified, and all incidental powers necessary to carry it on
are granted. These powers are such as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently. This necessarily implies the right of the bank to incur liabilities in the regular course of its business, as well as to become the creditor of others.'"

"Nor do we doubt that a bank, in certain circumstances, may become a temporary borrower of money. Yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money."

"Even, therefore, if it be conceded that it was within the power of the board of directors of the Fidelity national bank to borrow $200,000 on time, it is yet obvious that the vice-president, however general his powers, could not exercise such a power unless specially authorized so to do, and it is equally obvious that persons dealing with the bank are presumed to know the extent of the general powers of the officers."

There was not only no evidence that Harper had the authority claimed for him, but also there was no evidence that negotiation of a loan or the borrowing of money was part of or incident to the transaction of banking business between Cincinnati, a commercial center, and New York, the commercial metropolis of the United States. The decision in Western National Bank *vs.* Armstrong, is to be recognized as the authoritative statement of the law—and certainly this court has no disposition to otherwise regard it—but it is to be taken with reference to the facts as they there appeared. It is a decision to be carefully limited, and not to be stretched or enlarged by construction or in application. It is true, upon the facts of that case, that the business of the bank was "to lend, not to borrow, money; to discount the notes of others, not to get its own notes discounted," and it is true in a certain general sense. But that the Supreme Court did not intend, by the use of that language, to lay down a rigid, inflexible rule, applicable to all cases and under all circumstances, is apparent from the reference to, and the quotation from, First National Bank *vs.* National Exchange Bank, 92 U. S., 127, which follows in immediate juxtaposition in the opinion as already cited and copied herein. This view is made more clear by the fact that immediately after this quotation the opinion pro-
ceeds: "Nor do we doubt that a bank, in certain circum-
312 stances, may become a temporary borrower of money," adding that by reason of the extraordinary character of such transactions it would be the duty of the lender to see to it that the officer or agent acting for the borrowing bank had special authority. The court then says:

"Even, therefore, if it be conceded that it was within the power of the board of directors of the Fidelity national bank to borrow $200,000 on time, it is yet obvious that the vice-president, however

general his powers, could not exercise such a power unless specially authorized so to do, and it is equally obvious that persons dealing with the bank are presumed to know the extent of the general powers of the officers."

"If it be conceded," or the corresponding phrase "however that may be," in a judicial opinion, may generally (not always) be taken as indicating that what he said upon the point referred to is not to be taken as the expression of an absolute, final conclusion; or as signifying that there is at least a tinge of obiter in what is thus qualified.

All these considerations, together with the circumstances that the entire discussion of the right of a national bank to borrow money, is introduced in the opinion after the finding that the transaction involved was upon its face and upon the facts an individual transaction, to which the Fidelity bank was not a party, and for which it was not liable; that finding being decisive and rendering the discussion of the power of a national bank to borrow money unnecessary, which is always to be taken into account in determining the weight of an authority, lead this court to the conclusion that the Supreme Court in Western National Bank *vs.* Armstrong was dealing with and deciding the case before it upon its facts and circumstances, without intending to lay down a rule or establish a precedent applicable to all cases, or even generally. The question of the authority requisite to enable its officers to conduct such transactions will be considered later. What is the proper business of a bank, and what incidental powers may be necessary to carry on the business of banking is not purely a question of law, nor altogether a question of fact. It is a mixed question of law and fact, depending, as to fact, upon circumstances and location. For illustration, a witness in this case, vice-president of one of the largest banks in Cincinnati, testified that while, since the decree in Western National Bank *vs.* Armstrong, he had made it a rule to consult his board of directors, "he would consider it his duty, if there was a run on his bank, and he had good bills receivable, to discount those bills, and if he couldn't see his directors it wouldn't take
313 him long to rediscount them without consulting them." No one will question that he would be justified in so doing, and that the bank would be bound; and no one would hesitate to say that if he should decline to do so because he could not get his directors together, and therefore should suffer his bank to fail, he would be grossly derelict. Then, again, the locality of the bank, the nature of its business, and the time of the transaction, may have much to do with determining what incidental powers are necessary to carrying on the business of banking. It is in testimony in this case that country banks in agricultural districts often borrow, sometimes heavily, at certain seasons of the year, from Cincinnati banks, to provide for the movement of crops. At other seasons, borrowing money might be entirely foreign to the legitimate business of banking, and, in other localities, it might be so regarded at any season, unless upon some extraordinary emergency. A cashier engaged in banking business for more than twenty years, testified to frequent

loans by city banks to country banks. In "fifty to sixty hundredths of the cases" the transactions took the shape of rediscounting paper; in many cases the loans were on county and municipal bonds. He referred to instances—one of a loan on bonds and securities of $150,000 and to rediscounts from $100,000 to $150,000, and added that nine-tenths of the loans were made by the officers without consulting the board, and that if the officers were satisfied with the security the amount of the loan made no difference—that is within the one-tenth limit, which they never exceed. Now, the city banks sustain to the banks of other cities, and especially to those of the city of New York, a relation in many respects similar to that of the country banks to the city banks. The difference is, that between cities, and especially between the interior cities and New York, the transactions are heavier, the exchanges are often of larger amounts, and they may occur at any season of the year. The witness last above referred to testified that St. Louis, the day before he gave his deposition, transferred $50,000 to New York, to the credit of his bank. It may be said that it would be an easy thing for the directors to confer upon *its* officers, by express terms, the requisite authority. But the question is not how much the authority shall be conferred or by whom exercised, but whether such transactions belong to the business of banking. By the evidence this case is clearly distinguishable from the Western National Bank *vs.* Armstrong, and such transactions are, as matter of fact, proven
314 to be included in the business of banking. They are also included as matter of law, because, by section 5136, Revised Statutes, power is granted to every national bank to "exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes." When the Supreme Court, in commenting upon this section, said that "the power to borrow money or to give notes is not expressly given by the act," and added, "the business of the bank is to lend, not to borrow, money; to discount the notes of others, not to get its own notes discounted," it was setting forth in crystallized form, what it deemed to be the substance of the provisions of the section, rather than stating a conclusion or formulating a rule. Accordingly, in the very next sentence, it cites with approval First National Bank *vs.* National Exchange Bank, quoting the passage which indicates that sec. 5136 is not to be so strictly construed as to limit the incidental powers to precisely the things specified in the section, for after stating that these powers are such as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs within the general scope of its charter, safely and prudently, it adds, "This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others." As is suggested by counsel for complainant, the enumera-

tion of powers in section 5136, though clear, is not put in a strictly logical order. Without changing its meaning, it might be paraphrased so as to read: "To carry on the business of banking by discounting notes, drafts, bills of exchange and other evidences of debt, by receiving deposits, by buying and selling exchange, coin and bullion, by loaning money on personal security, and by obtaining, issuing and circulating notes according to the provisions of this act, and to exercise, by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on such business of banking."

This case is also distinguishable from Western National Bank *v.* Armstrong in that there the court find that the transaction was in form as well as in fact an individual one and that finding alone was decisive of the case. The court below had entered its decree
315 upon that ground for it did not touch upon the question of authority or power, which was not even suggested. Here the transaction was in form in behalf of the Fidelity bank. Neither the power nor the authority of Harper was questioned in the court below, nor was the liability of the bank. The litigation was exclusively concerning the amount due and the interest. So it was in the court of appeals until after the opinion in Western National Bank *v.* Armstrong was filed in the Supreme Court. Again there the loan was for four months, here it was on call, a very important difference. Upon the evidence the finding of this court is that the power of the Fidelity to borrow money by conducting such a transaction as is involved in this case, is established and that the same is legitimately within the business of banking, under the national bank act.

The remaining question is whether Harper had authority to conduct the transaction. He was vice-president and acting president, the chief executive officer of the bank. His position made him a vice-principal—a representative of the bank, not merely its servant or employee. From the nature and necessities of the business of banking and the constantly occurring instances or emergencies when success or failure in the conduct of the particular transaction depends upon the executive ability, the judgment, and the decision of the officer representing the bank, in reference to points which could not have been anticipated and which must be promptly and without hesitation settled, it is evident that a large discretion must be vested in such officers. To require special authority for their acts would so embarrass the conduct of the business as to seriously interfere with, if not entirely prevent the prosperous conduct of its affairs. Hence such officers stand among the highest in the rank of general agents. Their position warrants the implication of the authority necessary to the performance of their duties, and when proof is made that transactions of the nature of that now under consideration have, for more than twenty years, in and about the city of Cincinnati and the city of New York *had* been conducted by them not only without special authority in each instance, but without any direct authority from their board of directors—in very many instances, indeed generally, without even consulting them—and with-

out any authority whatever except that to be inferred from long established custom and usage—which is as good in the case of a corporation as in the case of an individual—it hardly can be maintained that more must be shown. The conclusion of this court is that the authority of Harper in this case is sufficiently established.

316 The point was made in the brief that the amount of the loan, $300,000, was sufficient to excite suspicion and put the complainant upon inquiry. That might be argued with much force, if there was in the then known condition of the Fidelity bank anything to indicate that its funds were being abstracted by its vice-president for his own speculative purposes, or that there was any irregularity in the conduct of its business. On the contrary the unlawful and criminal operations of Harper were not publicly known or known to the president or board of directors of his own bank until they were brought to light by the failure in June, more than three months after the loan by the Chemical. At the date of that loan the affairs of the Fidelity bank *was* apparently prosperous. It appears in evidence that single loans of from $100,000 to $150,000 had been made by Cincinnati banks to country banks and that such transactions were recognized in the ordinary course of banking business, and that it was the custom of New York banks to make heavy loans to western and southern banks. Why then should the Chemical, having no possible motive to enter upon an irregular transaction, ar d expecting only a low rate of interest, acting upon an application regular upon its face, with bills receivable as collateral, everything being in the usual form, not knowing and not having the means of knowing anything whatever to excite suspicion, there being nothing which the most careful inquiry would have disclosed, have hesitated to make the loan. In this connection the statement of the law with reference to the vigilance required of bank directors by Lord Moncreiff in his charge to the jury upon the trial of the directors of the City of Glasgow bank, is in point: 'A director is generally a man who has other avocations to attend to. He is not a professional banker. He is not expected to do the duty of a professional banker, as we all know. He is a man selected from his position, from his character, from the influence he may bring to bear upon the welfare of the bank, and from the trust and confidence which are reposed in his integrity and in his general ability. But I need not say that it is no part of his duty to take charge of the accounts of the bank. He is entitled to trust the officials of the bank who are there for that purpose, and as long as he has no reason to suspect the integrity of the officials, it can be no matter of imputation to him that he trusts to the statements of the officials of the bank acting within the proper duties of the department which had been entrusted to them." Verbatim report of the trial, page 433.

317 If such be the rule as to directors, I see no reason why, under the facts in this case, the extraordinary caution insisted upon by counsel should have been exercised by the Chemical. As long as Harper was accredited to the officers of the Chemical

bank as the chief acting executive officer of the Fidelity bank, and there was nothing in the known state of its affairs, or of its relations to that bank to excite suspicion, the officers of the Chemical had the right to trust in his integrity, and to conduct their transactions with him accordingly. I have already stated why, in my opinion, the rule in Western National Bank *v.* Armstrong does not apply.

Counsel for complainant cite the New York banking act of 1838, containing almost the exact words of the seventh clause of section 5136, and the case of Curtis *v.* Leavitt, 15 N. Y., 9–52, *et seq.*, quoting from Judge Comstock that banking "regarded as a business and not as a franchise, includes the borrowing of money as one of its features and incidents," and after citing Bank of Australia *v.* Breillat, 6 Moore's P. C., 152–194, proceeds to a discussion of the right of a bank to borrow money.

After referring to the fact that in the New York act the power to borrow money is not found in the section containing the specifications relating to the business he adds: "If the statute had omitted the general term 'business of banking' and had merely enumerated the power of issue and all the others named in the 18th section, that would have been a general grant of banking powers, including as their incident the right to borrow money when a necessity may arise in the exercise of those powers" as incident to the business of banking. Counsel also cite 19th New York, 156, affirming Curtis *v.* Leavitt and holding that "the cashier in virtue of his general employment could exercise the power was not denied upon the argument, and the proposition does not admit of a reasonable doubt." They also refer to Morse on Banks and Banking, section 63, and authorities quoted; also to Bank of Augusta *v.* Earl, 13th Peters 519, and Tombigbee R. R. *v.* Kneeland, 4th Howard, 16. The case of Curtis *v.* Leavitt, decided in 1857, is valuable as evidencing that the borrowing of money by one bank from another bank was, years before the enactment of the national bank act, recognized by the court of last report of the State of New York, the place of the transaction here involved, as included, both as a matter of fact, and in law, in the business of banking. But the general question of law is not open for consideration in this court. Western National Bank *v.* Armstrong is authoritative so far as it applies, and would control if this case were not distinguishable upon the facts, as has already been pointed out.

318 The decree will be for the complainant for the amount and with interest as directed by the mandate.

GEO. R. SAGE,
U. S. District Judge.

Oct. 13, 1896.

And afterwards, to wit, on the 21st day of October, A. D. 1896, an entry was made upon the journal of said court; said entry is clothed in the words and figures following, to wit:

Entry.

Journal 3, page 361.

This cause came on to be heard upon the mandate from the United States court of appeals for the sixth circuit, filed April 22nd, 1895, and the pleadings, and the evidence taken since the filing of said mandate, as well as that heretofore received, and the admission of the respondent in open court that upon the 15th day of August, 1894, a further dividend had been declared from the assets of the Fidelity national bank to the creditors of said bank of eight (8) per centum, and was argued by counsel and taken under consideration by the court. And the court being now fully advised, finds that the Fidelity national bank, upon the second day of March, 1887, borrowed from the complainant the sum of three hundred thousand ($300,000.00) dollars, and that on the 21st day of June, 1887, when the Fidelity national bank was declared insolvent, there was due from the Fidelity national bank to the complainant the said sum of three hundred and five thousand four hundred and fifty dollars ($305,450.00); that dividends have been declared from the assets of the Fidelity national bank to the creditors thereof at the dates, and for the rates per centum, as follows; that is to say:

On October 31st, 1887, the first dividend, of twenty-five (25) per centum.

On June 15th, 1889, the second dividend, of ten (10) per centum.

On June 30th, 1890, the third dividend, of ten (10) per centum.

On August 5th, 1891, the fourth dividend, of five (5) per centum.

On August 15th, 1894, the fifth dividend, of eight (8) per centum.

The court further finds that upon the 25th day of April, 1890, the defendant rejected the claim aforesaid of the complainant, which had been theretofore presented to him; and that after the previous decree of this court upon, to wit, the 25th day of July, 1892, said defendant paid to said complainant the sum of one hundred thousand ($100,000.00) dollars upon account of the sum which
319 might be due to the complainant pursuant to the provisions for that purpose made in the decree of this court, entered in this cause on the 8th day of July, 1892.

The court finds that there is now due this 21st day of October, 1896, to the complainant from the defendant the sum of one hundred and seventeen thousand seven hundred and forty-nine dollars and seventy-eight cents ($117,749.78), being the dividends aggregating fifty-eight (58) per centum heretofore declared from the assets of the Fidelity national bank, computed upon the amount of the complainant's claim as herein allowed, with interest on those of said dividends which were declared prior to April 25th, 1890, from said last-named day, and with interest upon those thereafter declared from the dates of their declaration, respectively, after crediting the said payment of one hundred thousand ($100,000.00) dollars, upon the 25th day of July, 1892, the computation being made upon the principle ordinarily applied in partial payments.

It is therefore ordered, adjudged and decreed that the defendant pay to the complainant, or to Wm. Worthington, its solicitor, the said sum of one hundred and seventeen thousand, seven hundred and forty-nine dollars and seventy-eight cents ($117,749.78), with interest thereon from said 21st day of October, 1896, and that hereafter, while any balance remains due the complainant upon said loan, said defendant pay to complainant dividends, calculated upon said sum of three hundred and five thousand — and fifty ($305,450.000) dollars, like to those paid to other creditors of the Fidelity national bank.

And it is further ordered that the defendant pay the costs of this cause to be taxed by the clerk.

And the said defendant, feeling aggrieved by the foregoing order and decree — to the United States circuit court of appeals for the sixth circuit, and presents his assignment of errors, which are filed, and prays that his appeal may be allowed, and that a transcript of the record and proceedings, and papers from which said order and decree was made, duly authenticated, may be sent to said United States circuit court of appeals for the sixth circuit; and thereupon, it is ordered that said appeal be allowed as prayed for, and that appellant give bond therefor in the sum of one thousand dollars.

And afterwards, to wit, on the 22nd day of October, A. D. 1896, the following petition for appeal and assignment of errors
320 were filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Petition for Appeal and Assignment of Errors.

United States Circuit Court, Southern District of Ohio, Western Division.

THE CHEMICAL NATIONAL BANK
vs.
DAVID ARMSTRONG, Receiver. } No. 4339.

Petition on appeal.

And now comes the said defendant, and appeals from the order and decree entered herein in this cause, to the United States circuit court of appeals for the sixth circuit, and presents his assignment of errors, which are herewith filed, and prays that his appeal may be allowed, and that a transcript of the record and proceedings and papers from which said order and decree was made, duly authenticated, may be sent to the United States circuit court of appeals for the sixth circuit, and that the bond given by him herein may be approved by this court, and his said appeal fully perfected.

JOHN W. HERRON,
Solicitor for Defendant.

Circuit Court of the United States, Southern District of Ohio, Western Division.

THE CHEMICAL NATIONAL BANK
vs.
DAVID ARMSTRONG, Receiver of the Fidelity National Bank. } No. 4339.

Assignment of Errors.

Now comes the said defendant and presents this his assignment of errors to the final decree of the court herein, to wit:

1st. Said court erred in finding that there was due to the said complainant from the Fidelity national bank, on the 21st of June, 1887, the sum of three hundred and five thousand, four hundred and fifty dollars ($305,450), or any other sum.

321 2nd. The court erred in finding that the complainant, on the 2nd of March, 1887, loaned to the said Fidelity national bank the sum of three hundred thousand — ($300,000), or any other sum.

3rd. The court erred in finding that the complainant was entitled to the same dividends upon the sum of three hundred and five thousand four hundred and fifty dollars ($305,450), as was declared to the creditors of the said Fidelity national bank.

4th. The court erred in finding that the several sums which had been paid to the complainant prior to the declaration of dividends by the defendant from collaterals sent to it as stated in the pleadings should not be deducted from the amount of such alleged loan in determining the sum upon which dividends to complainants should be paid.

5th. That the court erred in finding that the sum of twenty-five thousand dollars ($25,000), which the complainant failed to collect from John B. Lewis, as stated in the answer of defendant, should not be deducted from said alleged claim in determining the sum upon which dividends to complainant should be paid.

6th. That the court erred in finding that the complainant is entitled to dividends upon the sum of three hundred and five thousand four hundred and fifty dollars ($305,450).

7th. Said court erred in finding that the complainant is entitled to interest on the several dividends declared by the defendant in favor of the creditors of the Fidelity national bank, from the date of the presentation of the alleged claim to the defendant, as to dividends declared prior to that date, and from the date of the declaration of dividends as to those declared after that date.

8th. That the court erred in refusing to compel the complainant to exhaust the collaterals held by it as security for said alleged loan, before ordering dividends upon the same to be paid to it, and in ordering dividends to be paid to complainant upon said alleged claim without reference to the collaterals still held by it.

9th. That the court erred in refusing to find that the said alleged

loan of three hundred thousand dollars, claimed to have been made on the 2nd of March, 1887, was without authority of the board of directors of the Fidelity national bank, and for which the said bank was not liable.

JOHN W. HERRON,
Solicitor for Defendant.

322 And afterwards, to wit, on the 26th day of October, A. D. 1896, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal 3, page 369.

The defendant, David Armstrong, receiver, having heretofore filed *its* petition in appeal and assignment of errors, the court doth now upon the application of his attorneys allow the appeal herein, and doth fix the appeal bond in the sum of $1,000.

And afterwards, to wit, on the 29th day of October, A. D. 1896, the following appeal bond was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Appeal Bond.

Circuit Court of the United States, Southern District of Ohio, Western Division.

THE CHEMICAL NATIONAL BANK OF NEW YORK
vs.
DAVID ARMSTRONG, Receiver of the Fidelity National Bank.

Know all men by these presents, that we, David Armstrong, receiver of the Fidelity National Bank of Cincinnati, Ohio, as principal and W. S. Rowe, as surety are held and firmly bound unto the Chemical National Bank of New York in the sum of one thousand dollars, to be paid to the said Chemical national bank, etc., successors in office or assigns. To which payment, well and truly — be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals. Dated this 29th day of October, 1896.

Whereas, the above-named David Armstrong, receiver as aforesaid, have taken out an appeal to the circuit court of appeals of the United States, sixth circuit to reverse the decree rendered in the above-entitled action by the circuit court of the United States for the southern district of Ohio.

Now, therefore, the condition of this obligation is such, that if the above-named David Armstrong, receiver as aforesaid, shall prose-

cute his said appeal to effect and answer all costs, if he
323 shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and virtue.

DAVID ARMSTRONG, [SEAL.]
Receiver the Fidelity National Bank,
By JOHN W. HERRON, *His Att'y.* [SEAL.]
W. S. ROWE. [SEAL.]

Sealed and delivered in presence of—
ROB'T C. GEORGI.

The above security is approved.
GEORGE R. SAGE,
District Judge of the United States, S. D. Ohio.

And afterwards, to wit: on the eighteenth day of November, A. D. 1896, the following alias mandate was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Alias Mandate.

UNITED STATES OF AMERICA, } ss:
Sixth Judicial Circuit, }

United States Circuit Court of Appeals for the Sixth Circuit.

The President of the United States to the honorable the judge of the circuit court of the United States for the southern district of Ohio, Greeting:

Whereas, lately in the circuit court of the United States for the southern district of Ohio, before you, or some of you, in a cause between The Chemical National Bank, complainant, and David Armstrong, receiver of the Fidelity National Bank of Cincinnati, respondent, where a decree was entered in said cause on the 8th day of July, A. D. 1892, as by the inspection of the transcript of the record of the said circuit court, which was brought into the United States circuit court of appeals for the sixth circuit by virtue of an appeal and cross-appeal agreeably to the act of Congress in such cases made and provided, fully and at large appear.

And whereas, in the term of October in the year of our Lord one thousand eight hundred and ninety-four, the said cause came on to be heard before the said United States circuit court of appeals for the sixth circuit, on the said transcript of record, and was argued by counsel.

On consideration whereof, the court made the following
324 order, namely: The previous order of the court is modified so as to make the order read as follows: That the decree of the circuit court is reversed with leave to parties to adduce further evidence upon the issue whether the Fidelity bank owes anything to the Chemical bank by virtue of the alleged loan.

That if the issue be decided in favor of the receiver the bill shall

be dismissed and a decree entered in favor of the receiver for the restitution of the $100,000.00 paid by the receiver July 25, 1892, to the Chemical national bank on the faith of the decree to allow the claim of $305,450.00 (being the amount of the loan and interest until the date of the insolvency, June 21, 1887), and to pay the dividends accruing on such claims with interest on those declared before April 25, 1890, from that date, and on those thereafter declared from the date, *and on those thereafter declared from the date* of declaration until the dividends and interest are paid, and to take credit on the payment of such dividends and interest for the $100,000.00 by him paid July 25, 1892, on the principle ordinarily applied in partial payments. It is further ordered that the costs in this court be divided equally between appellant and appellee, and that the costs in the court below follow the decree of that court. Feb. 5, 1892.

You, therefore, are hereby commanded that such proceedings be had in said cause, in conformity with the opinion and decree of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeals notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the eighteenth day of November, in the year of our Lord one thousand eight hundred and ninety-six.

Costs of this Court to be Divided Equally.

Clerk	$36 30
Printing record	291 91
Attorney	20 00
	$348 21

FRANK O. LOVELAND, [SEAL.]
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

United States circuit court of appeals for the sixth circuit. No. 56. October term, 1894. Chemical National Bank of New York *vs.* David Armstrong, receiver of Fidelity Nat. Bk. of Cincinnati, Ohio. Alias mandate. Filed Nov. 18, 1896. B. R. Cowen, clerk.

325 UNITED STATES OF AMERICA, } *ss:*
Southern District of Ohio, Western Division, }

I, Benjamin R. Cowen, clerk of the circuit court of the United States of America, within and for the division and district aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings by and before said court, in the above-entitled cause as the same appears of record, and on file in the clerk's office of said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the city of Cincinnati, Ohio, this eighteenth day of November, A. D. 1896.

[SEAL.]

B. R. COWEN, *Clerk,*
By ROB'T C. GEORGI,
Deputy Clerk.

UNITED STATES OF AMERICA, } ss:
Sixth Judicial Circuit, }

United States Circuit Court of Appeals for the Sixth Circuit.

To the Chemical National Bank of New York, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States circuit court of appeals for the sixth circuit, to be holden at the city of Cincinnati, in said circuit, on the 28th* day of November next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, wherein David Armstrong, as receiver of the Fidelity National Bank of Cincinnati, Ohio, is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this twenty-ninth day of October, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the United States of America the one hundred and twenty-first.

GEO. R. SAGE,
Judge of the U. S. District Court within and for the Southern District of Ohio, Sitting and Holding Circuit Court, at the Trial of said Cause.

326 STATE OF OHIO, } ss:
County of Hamilton, Southern District of Ohio, }

On this 10th day of November, A. D. 1896, personally appeared before me, John W. Devanney, and made oath that he delivered a copy of within citation to William Worthington, agent of the Chemical National Bank of New York, who accepted service of same.

JOHN W. DEVANNEY.

Sworn to and subscribed before me this 11th day of November, 1896.

[SEAL.] ROB'T C. GEORGI,
Deputy Clerk, U. S. Circuit Court, S. D. O.

Fees.

Copy	$0 50
1 service	2 00
1 M. writ	06
Return	30
	$2 86

* Not exceeding 30 days from the day of signing.

No. 4339. United States circuit court, southern district of Ohio, western division. The Chemical Nat'l Bank of N. Y. *vs.* David Armstrong, as receiver of the Fidelity nat'l bank. Citation. Marshal's civil docket No. 92. Filed Nov. 11, 1896. B. R. Cowen, clerk.

327 And afterwards, to wit, on November 25, 1896, an appearance was filed in said court in said cause, which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit, October Term, 1895.

DAVID ARMSTRONG, Receiver Fidelity National Bank,
v.
CHEMICAL NATIONAL BANK OF NEW YORK. } No. 473.

To the clerk of said court:

Please enter my appearance as counsel for the appellant.

JOHN W. HERRON.

And afterwards, to wit, on May 10, 1897, an entry was made upon the journal of said court in said cause, which is in the words and figures as follows:

DAVID ARMSTRONG, Receiver Fidelity National Bank,
v.
CHEMICAL NATIONAL BANK OF New York. } Appeal from the Circuit Court of the United States for the Southern District of Ohio. Before Judges Taft, Lurton, and Severens.

This cause came on to be heard this day and was argued by Mr. John W. Herron for the appellant and by Mr. George H. Yeaman and Mr. Wm. Worthington for the appellee, and the hearing is continued until tomorrow.

328 And afterwards, to wit, on May 11, 1897, an entry was made upon the journal of said court in said cause, which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

DAVID ARMSTRONG, Receiver Fidelity National Bank,
v.
CHEMICAL NATIONAL BANK OF New York. } Appeal from the Circuit Court of the United States for the Southern District of Ohio. Before Judges Taft, Lurton, and Severens.

This cause came on to be further heard this day and was argued by Mr. Wm. Worthington for the appellee and by Mr. John W. Herron for the appellant, and submitted to the court for decree.

And afterwards, to wit, on December 7, 1897, a decree was entered in said court in said cause; which decree is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

DAVID ARMSTRONG, Receiver Fidelity National Bank, v. CHEMICAL NATIONAL BANK OF New York.	Appeal from the Circuit Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of Ohio, and was argued by counsel.

329 On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed with costs.

And afterwards, to wit, on December 10, 1897, and opinion was rendered in said cause, which is in the words and figures as follows:

Opinion.

330 United States Circuit Court of Appeals, Sixth Circuit.

DAVID ARMSTRONG, Receiver of the Fidelity National Bank, vs. THE CHEMICAL NATIONAL BANK.	No. 473. Appeal from the Circuit Court of the United States for the Southern District of Ohio, Western Division.

Submitted May 11, 1897. Decided Dec. 7, 1897.

Before Taft and Lurton, circuit judges, and Severens, district judge.

The bill in the circuit court was exhibited by the Chemical National Bank of New York City against David Armstrong, receiver of the Fidelity national bank, to compel the allowance of a claim of $300,000, with interest, for a loan alleged to have been made by the Chemical bank to the Fidelity bank on March 2, 1887. In his amended answer, the receiver denied that the Fidelity bank had incurred the obligation, as alleged, or had received the proceeds thereof, but averred that its vice-president, E. L. Harper, and its cashier, Ammi Baldwin, in pretending to bind the Fidelity bank thereto, had acted fraudulently and without authority of its directors, and in furtherance of a fraudulent scheme, by which the proceeds of the alleged loan were all appropriated to the use of Harper, and that all this was without the knowledge of the bank or its directors. It was conceded that a large amount of collateral had been deposited to secure payment of the loan. At the original hearings in the circuit court, and in this court, the question of Harper and Baldwin's authority to bind the Fidelity bank was but little discussed, although made both upon the pleadings and in the assignments of error.

331 It was disposed of in a single sentence against the contention of the receiver in the first opinion in this court. The main question there considered was whether the Chemical bank was obliged to reduce its claim by the proceeds of collateral held to se-

cure the debt, and collected after the declared insolvency and before the filing of proof. This court, reversing the circuit court, held that no such deduction need be made, but that the claim must be allowed in full for the principal and interest due and unpaid at the date of the declared insolvency. 16 U. S. Ap., 465. A motion for rehearing was made by the Chemical national bank on a subordinate question as to the interest to be allowed on delayed dividends. Pending the motion, the Supreme Court of the United States announced its opinion in the case of the *Western National Bank v. Armstrong, Receiver*, 152 U. S., 346, in which it was held that "the borrowing of money by a national bank, though not illegal, was so much out of the course of ordinary and legitimate banking business as to require those making the loan to see to it that the officer or agent acting for the bank has special authority to borrow money," and that where no special authority appeared, and no ratification of the unauthorized act was shown, the bank was not liable. Thereupon, while the case on hearing was still before this court, Armstrong also made a motion for rehearing on the issue whether the Fidelity bank was liable for the alleged loan. A rehearing was granted and had, and the following order was made: "That the decree of the circuit court is reversed with leave to the parties to adduce further evidence upon the issue whether the Fidelity bank owes anything to the Chemical bank by virtue of the alleged loan; that if the issue is decided in favor of the receiver the bill shall be dismissed, and a decree entered in favor of the receiver for the restitution of the $100,000 paid by the receiver on July 25, 1892, to the Chemical bank on the faith of the decree of the court below; that if the liability of the Fidelity bank for the loan is established, a decree shall be entered directing the receiver to allow the claim for $305,450 (being the amount of the loan and interest to the date of the declared insolvency, June 21, 1887)," and to pay the dividends accrued and accruing thereon, with interest on delayed dividends, taking credit for the $100,000 already paid on the principle ordinarily applied in partial payments. 31 U. S. Ap., 75. New evidence was accordingly adduced in the circuit court by both parties, and, upon the whole record, the circuit court held the Fidelity bank liable for the loan, and thereupon entered a decree against the receiver in accord with the mandate of this court, for the allowance of the claim for $305,450, and for the payment, by way of dividends and interest, after crediting the $100,000 paid July 25, 1892 (referred to above), of $117,749.58, with interest from October 21, 1896. The opinion of Judge Sage, who presided in the circuit court, is reported in 78 Fed. Rep., 339.

The facts disclosed by the record are thus:

On February 28, 1887, Harper, vice-president of the Fidelity bank, mailed at Cincinnati, to the cashier of the Chemical bank in New York, a letter, of which the following is a copy:

332 Briggs Swift, president; E. L. Harper, vice-president; Ammi Baldwin, cashier; Benjamin E. Hopkins, ass't cashier.

United States depository,

The Fidelity national bank.

CINCINNATI, *February* 28, 1887.

Wm. J. Quinlan, Jr., cashier Chemical national bank, New York city.

DEAR SIR: Enclosed herewith we hand you for credit our certificate of deposit No. 345 for $300,000, with bills as collateral, as follows: (Then was set out a list of twenty-seven notes, aggregating $326,000.) We desire to keep a large reserve with you, and we trust you will make the rate as low as you proposed some time since. Please place the amount to our credit and advise the rate.

Respectfully yours, E. L. HARPER,
Vice-President.

The certificate of deposit inclosed was as follows:

The Fidelity national bank.

E. L. Harper has deposited in this bank three hundred thousand ($300,000), payable to the order of himself on return of this certificate in current funds.

$300,000. AMMI BALDWIN, *Cashier.*

Indorsed, "E. L. Harper."

This letter of February 28th was not copied into the letter-press copy books of the Fidelity bank, and the stub of certificate of deposit was marked "canceled." Of the collateral bills receivable sent, nineteen pieces, aggregating $146,169.29, par value, were the property of the Fidelity bank, and the remainder, aggregating $180,000, were mere accommodation paper procured by Harper and not appearing on the books of the Fidelity bank.

The letter reached New York on March 2d, and, upon that day, Quinlan, cashier of the Chemical bank, wrote and mailed the following letter:

NEW YORK, *March* 2, 1887.

A. Baldwin, Esquire, cashier.

DEAR SIR: Your favor of the 28th inst. has been received. We credit Fidelity national bank $300,000, and shall be considerate as to rate of interest when the loan is paid. * * *

WM. J. QUINLAN, JR., *Cashier.*

Upon the books of the Chemical bank was entered, on March 2d, this credit in favor of Fidelity:

Fidelity temp. loans..... .....$300,000

333 Upon the 2d of March, two days before Harper could have received the answer, he directed Watters, the general bookkeeper of the bank, to credit his (Harper's) individual account

with $300,000, and to charge the Chemical bank with the same on account of "transfer of funds." These two entries taken together, meant that Harper had deposited $300,000 in the Chemical bank to the credit of the Fidelity bank, and that the same had been carried to his individual credit on the books of the latter bank.

On May 19th the following telegram was sent to the Chemical bank:

CINCINNATI, *May* 19, 1887.

To Chemical national bank, New York:

We send other bills to take place. Will want all returned here without presenting, as we advised parties to arrange payment here

FIDELITY NATIONAL BANK.

On May 20th Harper wrote and mailed the following letter:

MAY 20, 1897.

William J. Quinlan, Jr., cashier, New York.

DEAR SIR: Please do not present any of the collateral paper for payment. We have advised parties we would order back and charge up here. We will tomorrow send you new notes to take place of ones maturing. We will pay the loan July 15th, and will pay interest till that date, if agreeable to you.

Yours truly, E. L. HARPER, *V. P.*

On May 21st Harper wrote and mailed the following letter:

CINCINNATI, *May* 21, 1887.

Chemical national bank, New York city.

GENTLEMEN: Inclosed herewith we hand you to hold as collateral the following bills: (Then follows a list of twenty-one notes, aggregating $230,592.46.)

Will you kindly return to me the following: (Then follows a list of nineteen notes of those forwarded in his letter of February 28th.)

We will pay the loan July 15, 1887, if agreeable to you, and will pay interest now to that date.

Respectfully yours, E. L. HARPER,
Vice-President.

The substitution of collateral was effected in accordance with Harper's request.

Nothing was paid on the loan, and nothing collected by the Chemical bank on the collateral, until after the suspension of the Fidelity bank.

There is affirmative evidence that three or four of the nine directors had no actual knowledge of this loan. And there is no evidence that any of the other directors had knowledge of it
334 except Harper and Baldwin, and probably Hopkins, the assistant cashier, who were all directors.

The Chemical bank based its contention that the Fidelity bank was liable for this loan on several grounds.

First. That it was the custom, in New York and Cincinnati, for banks to borrow money, one from another, and that the executive officers of the bank—the president, the vice-president and the cashier, or either of them—were, by custom, regarded as having authority to contract such loans.

Second. That the directors of the Fidelity bank had entirely abandoned to Harper the direction and management of the affairs of the bank, and thereby conferred upon him all necessary authority to do what they might do.

Third. That the Fidelity bank had full notice of the loan nearly three months before the suspension, and, by failure to repudiate it, ratified it.

Fourth. That the Fidelity bank received the money and used it in its legitimate business, and is liable therefor as for money had and received.

It is convenient to state the facts of the case under these four heads:

First. Upon the question of custom, seven witnesses were called from New York city and six from Cincinnati by the complainant and appellee. Wm. J. Quinlan, cashier of the Chemical national bank since 1878, testified that prior to the decision in the Western Bank case, it was a very usual thing for a national bank to borrow money; that the officer who acted for the bank was either the president, vice-president, cashier or assistant cashier; that never, in the many years during which the custom prevailed, had the lending bank demanded proof of the authority of the borrowing officer in the form of a resolution of the board of directors; that the loans so made were in amounts large and small, and that the loans were made either upon certificates of deposits, made payable to the lending bank or indorsed in blank, or merely upon request by letter; that collateral was usually required to the amount of the loan, in the shape of bills receivable.

George G. Williams, president of the Chemical bank since 1878, and connected with it for forty years as discount clerk, paying teller, cashier and president, and for many years connected with the New York clearing-house, testified that it was usual for one bank to borrow money of another before the Western Bank decision; that it was done by a rediscount of its bills receivable, by its own note secured by collateral or by a certificate of deposit; that the borrowing bank was represented in the transaction by the president, vice-president, or cashier, or other executive officer who was authorized to sign drafts and letters for the bank; and that, before the decision in the Western Bank case, the lending bank never required any evidence from the board of directors as to the authority of the borrowing officer, because the New York decisions were express to the point that it was not necessary; that his own bank did not borrow money, but that he had had a long experience in lending money for his bank to other banks.

335 Dumont Clarke, president of the American Exchange national bank for two years, and connected with it for thirty years as assistant cashier, cashier and vice-president, testified that

prior to the decision in the Western Bank case it was a very common occurrence for one bank to borrow of another; that the cashier or the president, or one of the officers acted for the borrowing bank; that the lending bank never required proof of special authority granted to the borrowing officer by his board of directors; that the loan was made either by rediscount of bills receivable or by a note of the borrowing bank, with collateral, or by a certificate of deposit, with collateral; that he knew the custom from the course in his own bank and by information as to the course in other banks; that his bank never borrowed money.

A. B. Hepburn, president of the Third national bank for two years and a half, Comptroller of the Currency for several years, national bank examiner for three years and superintendent of the New York State bank department for four years, testified that it was a usual thing for banks to borrow money from other banks prior to the decisions in the Western Bank case; that either of the executive officers—the president, vice-president, cashier or assistant cashier—acted for the borrowing bank in such transactions; that the lending bank never required any proof as to authority of the borrowing officer, but relied on the genuineness of his signature to the application and correspondence, and protected itself by passing the money to the credit of the borrowing bank upon the books of the lending bank, so that it could only be drawn out by the checks of the officers in the regular course of business; that he never knew of an instance where the lending bank required a grant of special authority by the board of directors of the borrowiug bank to the borrowing officer; that the form of the loan was usually either a direct rediscount of bills receivable, with a margin of 20 or 25 per cent., or a note, with the bills as collateral, or a certificate of deposit; that loans were sometimes made on the unsecured note of the borrowing bank.

Edward Townsend, cashier of the Importers' & Traders' national bank for fifteen years, testified that it was usual for one bank to borrow money of another; that any official, whose signature was authorized with the lending bank, acted for the borrowing bank; that never, prior to the decision in the Western Bank case, did the lending bank require a resolution of the board of directors of the borrowing bank; that the loan was effected either by rediscount of bills receivable or by a note, with collateral, or by certificate of deposit; that no change had taken place in the practice of his bank since the Western Bank decision.

George F. Baker, president, cashier and teller of the First national bank for thirty years, testified that it was a usual thing for a bank to borrow money from its correspondent bank; that any of its executive officers acted for the borrowing bank; that no resolution of the directors evidencing the officer's authority to borrow the money was ever required before the Western Bank decision, but that such a resolution is now generally required; that the witness's own bank had litigation with the receiver over a loan made by it to the Fidelity through Harper.

336 Frederick D. Tappan, for twenty-seven years president of the Gallatin national bank, and connected with that bank for forty-five years, testified that it was a usual thing for a bank to borrow of its correspondent bank; that the president, the vice-president or the cashier acted for the borrowing bank; that the lending bank never required any special authority from the board of directors of the borrowing bank, prior to the Western Bank decision; that the loans were usually evidenced by notes, with security attached, and sometimes by a certificate of deposit; that ever since the Western Bank decision no change had occurred in the custom in witness's bank, and that collateral on such loans was not always required.

The first of the Cincinnati witnesses was M. M. White, who had been president of the Fourth National Bank of Cincinnati for fifteen years, and cashier for six years prior to that. He testified that it was a usual occurrence, and regarded as legitimate in the line of banking business, for one bank to borrow money of another; that never, until the decision of the Western Bank case, had the authority of the executive officer of the bank—the president, vice-president or cashier, to convey the liability of the bank upon his signature in borrowing money from another bank—ever been questioned among Cincinnati banks; but that since the Western Bank decision many banks had required a resolution of the directors of the borrowing bank before making a loan; that it was an extraordinary thing for a banker in Cincinnati to borrow from $300,000 to $500,000 for his bank; that where a bank is short of money and long in bills, as frequently occurs, it was legitimate and proper, and not an unusual thing, for a bank to rediscount freely and build up its cash; that the witness's bank had once borrowed $75,000 for such a purpose; that it was reported to the directors, and all such transactions should be reported by the acting officers to the directors.

W. A. Goodman, twenty years a banker and president of the Lafayette national bank, testified that it was not a very unusual or extraordinary thing for a bank to borrow of its correspondent; that it was rather unusual, but was done frequently, though the witness's bank never did it; that witness's bank had not many country correspondents; that in making loans by rediscounting their paper, no resolution of their board of directors was required; that he never had an application by a bank to borrow money on its own name, but that on such an application he would have required a resolution from the board of directors.

W. S. Rowe, cashier of the First national bank, testified that before the decision of the Western Bank case it was considered within the scope of the duties of a cashier to borrow money for his bank; that the country banks often borrowed money; that it was generally done by correspondence; that the letter would be signed by either the president, vice-president or cashier; that it was done either by rediscounting or by a direct note, signed by an executive officer of the bank, and that a resolution of the directors was never required; that the witness's bank had loaned as much as $150,000 to a country

bank on bonds and securities; that the bank of Goodman,
337 the last witness, did only a local business, and lent little or nothing to country banks; that such loans were always reported to the directors of the lending bank; that by country banks witness meant banks in the small cities in the agricultural districts, where, when crops were to be moved, more money was needed than they had; that witness would not regard it as good banking for an officer of a bank to borrow $300,000 without consulting his directors; that witness's bank did not borrow money.

H. C. Yergason, president of the Merchants' national bank, testified that his bank had occasionally made loans to country banks, but had never required any authority from the directors, and had deemed the authority of the executive officer sufficient; *this* his bank had occasionally borrowed money, but the directors had always been consulted before doing so.

Griffith P. Griffith, vice-president of the Citizens' national bank, testified that he had been vice-president and cashier of his bank fifteen years; that he had been assistant cashier of the First national bank from 1863 to 1866, and cashier of the Third national bank from 1867 to 1880; that it was a usual thing for banks to borrow money of their correspondent banks when applied for either by the president, the vice-president or the cashier of the borrowing banks, and that no proof of any special authority from directors was demanded from such officers; that the loans were made almost entirely by correspondence, and the proceeds of the loan were credited on the books of the lending bank to the borrowing bank; that the loans were made either by rediscount or by direct loans, with bonds or good securities; that banks with which he had been connected had not been in the habit of borrowing money; that witness would not hesitate to rediscount bills without consulting his directors, if there was a run on the bank.

J. D. Hearne, president of the Third National Bank of Cincinnati, and former president of the Covington City bank, testified that it was an ordinary thing for one bank to borrow of another, and that prior to the decision in the Western Bank case it was not customary for the lending bank to require from the borrowing bank a resolution from the board of directors; that the executive officers of the borrowing bank acted for it in the transaction; that no proof was required of special authority in those officers; that it was regarded as falling within the scope of the duties of cashier, president or vice-president to borrow money on behalf of his bank from another bank; that loans were made by a rediscounting and by direct loans, with bills receivable, or other collateral; that sums lent by his bank to other banks were usually not large; that witness had borrowed money in large sums for his banks; that he always consulted his directors before borrowing; that he never advised the lending bank in such cases of the approval of his board of directors, because it was never requested; that since the decision in the Western Bank case the custom had changed, both in his bank and in other banks with whose mode of business he was familiar, and that a reso-

lution of the board of directors is now required by them before lending money to a bank.

338 No witnesses upon the subject of custom were called by the receiver.

Second. E. L. Harper was a director, Ammi Baldwin was cashier and Benj. Hopkins was teller of the Third national bank. While occupying these positions they had been engaged together in wheat gambling, and had been charged with misconduct in the management of that bank in connection with the gambling. In February, 1886, Harper and others organized the Fidelity bank, and the bank opened for business March 1st. Harper took more than one-quarter of the stock. He was elected vice-president; Baldwin, cashier, and Hopkins, assistant cashier. Shortly after organization a committee of the directors investigated the charges concerning Harper, Baldwin and Hopkins, made by Hearne, then president of the Third national bank, but the directors declined to hear the report. Alter, a director, who wished to read the report, made himself still more obnoxious by asking to see the call-loan account, but access to it was denied him. The directors held four meetings in 1886—one in February to elect officers, the second in May to appoint a committee to draft by-laws, the third in August to approve the by-laws and the fourth a special meeting to vote a dividend. No other business was done by the directors during that year, and Harper managed the bank without the slightest supervision of any kind. At the annual election Alter was dropped as a director, and of the nine elected, Harper, Baldwin and Hopkins, Mathews, Harper's brother-in-law, and Gahr, his confidential secretary, constituted a majority. Mathews and Gahr were, confessedly, Harper's puppets in the board. He gave them ten shares each to qualify them, and then each also held a large amount of stock in his name, which belonged to Harper. Mathews was first elected in February, 1886, and resigned to allow some one else to be elected in his place. He was re-elected in January, 1887, to take the place of Alter and remained in the board to the end. The explanation of his position in the board, and of that of Gahr, is seen by the following question and answer:

Q. Mr. Mathews, you said something a little while ago off the record, which did not go down in the stenographic report—something about your directorship being nominal. Will you explain what you meant by that?

A. Yes, sir. It was understood between Mr. Harper and me—and I think the same is true as to Mr. Gahr—that we were to be directors only until others were found to take our places; and, in explanation, I will say that one time Mr. Harper told us that one of us would have to step out—that one of us would have to resign as director to allow somebody else to supply the place—and I know Mr. Gahr and I tossed coppers to see which of us would withdraw.

Mathews was not only Harper's brother-in-law, but he was one of the executive officers of Harper's corporations—the Riverside Rolling Mill Company, Swift's iron & steel works, and E. L. Harper & Co.

In January, 1887, Harper and Hopkins entered upon a compre-

hensive scheme of wheat gambling, and Baldwin was acces-
339 sory thereto. In carrying out their plan, Harper raised money by discounting, with the funds of the bank, the paper of E. L. Harper & Co., Swift's iron & steel works, and the Riverside Rolling Mill Company, in all of which companies he was the controlling member, and also by cashing the checks of these companies and carrying the checks as cash on the books of the bank. This was done with the knowledge and connivance of Mathews, the director. In these ways Harper consumed of the money of the bank, between January and June, $750,000. The daily discounts were recorded in a book, which was open to the inspection of the directors. Kineon, one of the directors, repeatedly called the attention of Swift, the president, to the large discounts in favor of Harper's companies and objected to it. Swift reported the matter to Harper, who said that if Kineon ran the bank he would keep all the money in the bank. Swift called Kineon's attention to Harper's large credits, and Kineon wanted to know where he got them. No further investigation or inquiry was made, however, until Kineon's resignation, hereafter described.

Harper's brokers in the wheat deal were Wilshire, Eckert & Co. He advanced, from the funds of the bank to that firm, on their notes and by cashing their checks and carrying the same in cash, a million and a half dollars, to be expended for his benefit in buying wheat on the Chicago market. He advanced, from the funds of the bank by way of discounts, to Whitely, Fassler & Kelly, a firm who were interested in the wheat deal, $375,000. He borrowed in February and March, 1887, in the name of the Fidelity bank, from the First National Bank of New York, $400,000, used $113,000 of the Fidelity bank's bills receivable in so doing and had $400,000 transferred to his credit on the books of the Fidelity bank, without exhibiting any written evidences of his right to such credit. He borrowed, in the name of the Fidelity bank, from the Chemical bank, the $300,000 here in controversy, in March, 1887, and forwarded as security $146,000 of the bills receivable of the Fidelity bank. In June, 1887, in order to tide over the stress in which the bank then was, he borrowed from the Chemical bank about $1,000,000 and transferred to that bank bills receivable of a greater value. He did this without any action by the board of directors. During this period of less than six months, over which these transactions extended, the board of directors held five meetings—one meeting in January to elect officers, another in February to approve of Harper's purchase of $340,000 in Government bonds to qualify the bank as a United States Government depository. These bonds were bought from the First National Bank of New York, and as a part of the contract of purchase that bank agreed to lend the $400,000 already spoken of, but it does not appear that this was known to the directors. The third meeting was held in March to declare a dividend; the fourth in March to vote an increase of stock, and the last in May, when Kineon, a director, demanded that the bills receivable be examined. Harper objected and told Kineon he ought to resign. Kineon said he would if Harper would buy his stock, which

Harper then did. A committee of directors was then appointed to examine the bills receivable, but no record is made of its re-
340 porting. No other business was done by the directors than has been stated.

The by-laws of the bank provided for monthly meetings, but during the year 1886 five meetings failed for want of a quorum. The by-laws provided that the president, vice-president and cashier should have power to discount and purchase bills, notes and other evidences of indebtedness, and to buy and sell bills of exchange, and to sign all contracts, drafts and checks. The cashier was made responsible for all the moneys, funds and valuables of the bank and was required to deliver the same to the order of the directors. The president and vice-president were made responsible for all sums of money and property entrusted to them or placed in their hands by the cashier. The last by-law expressly forbade the carrying of checks or other memoranda as cash, but required them to be entered upon the books as call loans. In spite of this, Mathews, one director, was privy to the carrying of $400,000 for several months in this way for Harper's accommodation. The president, Briggs Swift, and Chatfield and Moorehead, directors, were also accommodated in this way. Watters, the general book-keeper, testifies that from the beginning to the end of the bank, the entries of cash upon the book were false, because of these so-called cash items; and Hinsch, the assistant receiving teller, testifies that nothing was carried as a cash item except upon Harper's order.

Armstrong, the receiver, filed a bill against the directors to recover compensation for the loss occasioned and made possible by their negligence and failure to supervise Harper's control of the bank. He charged them therein with liability for losses arising from excessive loans made by the banks to Wilshire, Eckert & Co. to Harper's companies, and to Whitely, Fassler & Kelly. He also charged them with permitting Harper, by their negligence, to embezzle more than $500,000, and from the evidence adduced in support of the averment, it is clear that this charge referred to the transfer of funds by Harper, to his credit, of $700,000, at the times when he had obtained the loans from the First national bank and the Chemical National Bank of New York. The solvent directors compromised the suit by paying the receiver $450,000, of which Swift, the president, paid $300,000; Chatfield, one director, $100,000, and Pogue & Zimmerman the remaining $50,000. Watters, the general book-keeper, testified that Harper controlled all the affairs of the bank; that no one else attempted to supervise his action in this regard, and that the directors permitted him to run the bank as he thought best.

Kincon, director, testified that "Harper did everything. He ran the whole bank," and that the directors were aware of this.

Hinsch, the assistant receiving teller, testified that Harper dictated as to all the operations of the bank.

Armstrong, the receiver, in his bill against the directors, said: "And complainant further avers that the said E. L. Harper, vice-president of said association, was permitted by the said directors of

said bank to manage the affairs of said banking association and to have charge and control of its moneys and assets without any
341 investigation or control of his management of the business of said banking association."

Again the bill averred as follows:

"Complainant further says that the said E. L. Harper, in connection with the said Ammi Baldwin and Benjamin E. Hopkins, had been theretofore, and for many years prior to the transactions in this petition alleged, engaged in excessive and reckless speculations in wheat and other commodities, and were well known to the president and directors of said association to be excessive and reckless speculators, and wholly unfit to have the charge, management and control of the moneys, assets and affairs of the said The Fidelity National Banking Association; and complainant avers that by reason of said facts and the knowledge thereof, the said president and directors were put upon inquiry as to the management of the affairs of said banking association, and the safe keeping and investment of its moneys and other properties, during the whole time, during which the money of said association was being loaned and embezzled and misappropriated, as hereinbefore set forth; yet the said president and the said directors, and each of them, in gross and wilful disregard of their duty as such directors, wholly failed to exercise the slightest diligence, or make the slightest investigation of the conduct of the business of said bank; and that any investigation of the affairs of said bank, or examination of its books and of the evidences of indebtedness held by said bank, would have disclosed to the said president, or either of said directors, that the moneys of said bank were being loaned, and liabilities to said bank were being contracted, in violation of the law, and that the affairs of said bank were being mismanaged and its moneys and assets were being embezzled and misappropriated in the manner hereinbefore set forth; and that the exercise of proper care and diligence in the discharge of their duty as president and as such directors, would have prevented the losses described to said banking association."

Third. The Chemical bank was the reserve agent and correspondent of the Fidelity bank from its organization to its suspension, and the latter kept a regular deposit with the former. At the end of each month the Chemical bank transmitted to the Fidelity bank an account current, showing the debits and credits for the month as taken from its ledger account. This account current was compared by the book-keepers of the Fidelity with the books of the Fidelity, and the differences noted on what was called a reconcilement sheet, which was returned to the Chemical bank, where the differences were examined and correspondence with explanations ensued. Upon April 1st the Chemical bank sent an account current for the month of March, in which the Fidelity appears credited as of date March 2, 1887, "tem. loan, $300,000." The book-keepers of the Fidelity bank negligently overlooked the discrepancy between the account current of the Chemical bank and their own books as to this item in that in the account it appeared as a temporary or call loan from the Chemical to the Fidelity bank, while

on their books it appeared not as the proceeds of the obligation of the bank, but only as a deposit by Harper in the Chemical
342 bank to the credit of the Fidelity bank. Accounts current and reconcilement sheets passed between the two banks on April 1st, May 1st, and June 1st.

In June, 1887, the Chemical bank advanced $1,000,000 to the Fidelity bank as a loan, by way of overdrafts, and received notes as collateral, exceeding in value the amount. The validity of the loan has never been disputed by the receiver. The circumstances under which it was made do not appear in the record, though the minutes fail to show that it was ever authorized by resolution of the directors. The Chemical bank paid itself the $1,000,000 out of the collateral, after the suspension of the Fidelity bank, and sought to use the surplus remaining for payment of the $300,000 loan, claiming that all the collateral held by it was equally applicable to both debts. The receiver, though not at that time denying the liability of the Fidelity bank on the $300,000 loan, disputed the right of the Chemical bank to "mass" the collateral, and contended that only the collateral deposited with each obligation could be applied to it. In an equity suit in the United States circuit court of New York, this issue was decided in favor of the receiver.

Fourth. The $300,000 credit of March 2, 1887, in the Chemical bank was drawn against by the Fidelity bank in the usual course of business and went to pay concededly legitimate obligations of the latter bank. It was all drawn out before April 1, 1887. Harper's account, including the transfer of $300,000 to his credit, was largely overdrawn when the Fidelity bank went into the hands of the receiver, June 21, 1887.

TAFT, circuit judge, delivered the opinion of the court:

Can the case before us be distinguished on any satisfactory grounds from that of Western National Bank against Armstrong, 152 U. S., 346? If not, the decree of the circuit court must be reversed.

In the Western Bank case, it appeared that by a letter of May 16, 1887, Harper asked for a loan from the Western bank of $200,000, and inclosed four notes for $50,000 each, due in four months, signed by A. P. Gahr and indorsed by Harper, and secured by 1,600 shares of Fidelity bank stock. The letter, though written on a letter-head of the Fidelity bank, was signed by Harper in his own name, without any official designation, but contained a request that the proceeds of the loan be put to the credit of the Fidelity bank on the books of the Western bank. This credit was, in a short time, exhausted, by drafts drawn in the name of the Fidelity bank, and signed, some of them, by Hopkins, the assistant cashier, and the remainder by Harper himself. The money thus drawn was appropriated by Harper to his own use, and never came into the actual possession or use of the Fidelity bank, and was not applied in any way for its benefit. There was evidence that Harper was vice-president and general manager of the business of the Fidelity bank.

The only question argued by counsel in the Supreme Court

was whether Harper and Jordan, who made the loan for the
343 Western bank, intended a loan to Harper or to the Fidelity bank.

The Supreme Court based its decision upon a ground not advanced or discussed, and held that even if Harper intended to bind his bank by this loan, he had no general authority, as its vice-president and principal executive officer, to do so, and that the record did not show any special authority conferred by the directors upon him for the purpose. The court further held that there was no evidence of a subsequent ratification of the loan by the directors, or of a receipt of the proceeds by the bank to its use and benefit.

Upon the question of the power of Harper and the directors, the court, speaking by Mr. Justice Shiras, used the following language:

"The most that can be claimed in this case is, that Harper acted as the principal executive officer of the bank. It cannot be pretended that, as such, he had power, without authority from the board, to bind the bank by borrowing $200,000 at four months' time.

"It might even be questioned whether such a transaction would be within the power of the board of directors. The powers expressly granted are stated in the eighth section of the national bank act (Rev. Stat., sec. 5136, par. 7): 'A national bank can exercise, by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security, and by obtaining, issuing and circulating notes.'

"The power to borrow money or to give notes is not expressly given by the act. The business of the bank is to lend, not to borrow, money; to discount the notes of others, not to get its own notes discounted. Still, as was said by this court, in the case of *First Nat. Bank v. Nat. Exchange Bank*, 92 U. S., 122, 127, 'authority is thus given in the act to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted. These powers are such as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others.

"Nor do we doubt that a bank, in certain circumstances, may become a temporary borrower of money. Yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money.

"Even, therefore, if it be conceded that it was within the power of the board of directors of the Fidelity national bank to borrow $200,000 on time, it is yet obvious that the vice-president, however

general his powers, could not exercise such a power unless
344 specially authorized so to do, and it is equally obvious that persons dealing with the bank are presumed to know the extent of the general powers of the officers."

The reasoning of the court is here based upon two propositions; first, that the borrowing of money by a bank is not within the ordinary business of the bank; and, second, that because it is of an extraordinary character, it is not within the scope of the power of the chief executive officer of the bank, without special authority conferred by the governing body of the bank—the board of directors. The court does not hold that the national banking act either expressly or impliedly forbids a bank to borrow money, but only that the power to do so is not expressly given by the act. The court concedes that, among the incidental powers necessary to carry on the banking business, is the power, under certain circumstances, temporarily to borrow money; but says, in effect, that it is so much out of the course of ordinary and legitimate banking that the executive officers of the bank, who have only authority to transact the ordinary business of the bank, could not exercise the power to borrow money, without special authority from the directors.

No special authority appears by the record to have been conferred on Harper to borrow the money here in question, but complainant below sought to establish the necessary authority by evidence that in New York and Cincinnati the executive officers of the bank were, by a general banking custom, accorded authority to borrow money on behalf of their banks. Two questions arise upon this evidence. Does it establish the custom? If it does, can the proof of the custom supply the place of the special authority decided by the Supreme Court to be necessary?

We have set out in the statement of the case, at perhaps too great length, a résumé of the evidence as to usage, because its sufficiency has been vigorously attacked by the counsel for the appellant. We think that the evidence establishes, in a most satisfactory way, that in 1887, when the loan at bar was made, and for many years previous, it was the frequent practice of banks in the interior to borrow money of their New York correspondents; that a similar practice prevailed in Cincinnati between the country banks in the neighboring territory and their Cincinnati correspondents, and that the borrowing was always done by one of the executive officers of the borrowing bank, and usually by letter; that no special authority from his board of directors was ever required, and that by the usage of banks in those two cities, at least, he was treated as having adequate authority for the purpose, as between his own bank and the lending bank. The only witness whose statement may be considered as falling short of this is W. A. Goodman, of Cincinnati, and he seems to have had little experience in transactions with country banks, and none in borrowing money for his own bank.

It does not militate against our conclusion that several of the witnesses testified that it was usual and proper for the borrowing officer to consult his directors before obtaining the loan, or to report it to them afterward. There are many important transactions

of the bank concededly within the power of the executive
345 officers, concerning which they consult their directors, or of which they make report. The question here is not what is the customary duty of a cashier or other executive officer in keeping his directors informed of what he is doing, but it is, what is his customary authority in acting on behalf of this bank and borrowing money from other banks?

It does not detract from the weight of the evidence that the banks of a majority of the witnesses do not borrow money. It is the lending bank who has to decide in such cases upon the question of appearance of authority, and their officers are best able to say what is the authority in the matter of borrowing, which well-known usage gives to the executive officers of the borrowing bank. Moreover, three of the Cincinnati witnesses had borrowed money for their banks, and their evidence was like that of the others.

Nor do we see how it affects the question of authority of the borrowing officer that collateral is usually demanded from the borrowing bank, and that the proceeds are credited in the books of the lending bank to the borrowing bank, to be drawn out in due course on drafts of the latter. This course of business, which operates as a check upon possible fraud by the officer assuming authority to borrow, does not indicate that he is not given, by custom, the requisite apparent authority to contract the loan on behalf of his bank; but, on the contrary, suggests a reasonable explanation why a custom, by which banks of the borrowing class might otherwise be prejudiced and exposed to risk of loss by the frauds of their executive officers, has been accepted and acquiesced in by them.

The failure of the defendant to call witnesses to contradict the evidence of the complainant upon the question of usage, lends most significant support to the view that it was well known and generally acquiesced in. *Summer v. Tyson*, 20 N. H., 384-387; *Citizens' Insurance Company v. McLaughlin*, 53 Pa. St., 490.

The New York and Cincinnati witnesses strongly corroborate each other as to the usage prevailing in both places; for it is well settled that the existence of a well-known usage in one place, or in one trade, has a tendency to establish the same usage in the same trade in another place similarly situated, or in a closely allied but different trade. *Citizens' Insurance Co. v. McLaughlin*, 53 Pa. St., 490; *Falkner v. Earle*, 3 Best & Smith, 360; *Fleet v. Murton*, L. R., 7 C. P., 126.

The next question is whether the usage proven can make up for the absence of proof of Harper and Baldwin's special authority to contract this loan. The theory upon which it is offered is, that bank directors in Cincinnati, who committed to their executive officers authority to conduct the business of their bank with a New York correspondent bank, were presumed to know the apparent authority which New York usage in the banking business would attribute to those officers, and are estopped, in the absence of special notice to such correspondent bank, to deny that those officers had actual authority equivalent to their customary authority. We think this theory to be sound. The borrowing was done in New York,

and it is New York usage which is important here. Bank
346 directors in Cincinnati, doing business in New York, are presumed to know the usages in that city; at least, so far as they affect out-of-town banks. *Goodenow v. Tyler*, 7 Mass., 36–47; *Dwight v. Whitney*, 15 Pick., 179–183; *Lewis v. Marshall*, 7 M. & G., 729–744; *Leach v. Beardslee*, 22 Conn. Rep., 404; *Cropper v. Cook*, L. R., 3 C. P., 194; *Bibb v. Allen*, 149 U. S., 481. The presumption of knowledge by the bank directors of the Fidelity bank, of the New York usage is greatly strengthened in this cause by proof that the same usage prevails with respect to the officers of banks bearing the same relation to Cincinnati banks which Cincinnati banks bear to New York banks. Well-established usages of a trade are presumed to be known to all persons engaged in that trade. *Carter v. Philadelphia Coal Co.*, 77 Pa. St., 286. It is noteworthy that the receiver did not call a single witness from the directors of the Fidelity bank to rebut this presumption as to their knowledge of the usage.

But it is said that to give such effect to the usage is, in effect, to refuse to follow the authority of the Western Bank case. We cannot understand why. Usage is a matter of fact until it becomes so general and well known to the courts, and is so often recognized by them, as to be crystallized into law. There was no evidence of usage adduced or considered in the Western Bank case. That makes a broad distinction between that case and the one at bar.

Again, it is said that the usage is illegal, because contrary to the law of the Western Bank case. The court in that case did not decide that it was unlawful to entrust the vice president or cashier with power to borrow money for his bank; it only held that in the absence of special authority, conferred either by by-law or resolution of the directors, such authority did not appertain to the office of cashier or vice-president, but remained with the directors. The manifest inference, from the language of the opinion is, that if the directors chose to do so, they might have expressly conferred such authority by a by-law. If they could do this by a by-law, why may they not by acquiescence in a well-known usage effect the same result? Can, therefore, a usage which assumes the conferring of authority be unlawful? We think not.

It cannot affect the validity of the usage that it may have derived strength from, or even had its origin in decisions of the State courts, which differ from the decision in the Western Bank case. It is undoubtedly true that there were decisions in the State courts of New York, Pennsylvania, Missouri, Wisconsin and Ohio (*Barnes v. Ontario Bank*, 19 N. Y., 152; *First National Bank of Allentown v. Sullivan*, 11 W. N. C., 362; *Donnell v. The Lewis County Savings Bank*, 80 Mo., 165; *Sturges v. The Bank of Circleville*, 11 Ohio St., 153, 167; *Rockwell v. Elkhorn Bank*, 13 Wisconsin, 653; *Ballston Spa Bank v. The Marine Bank*, 16 Wisconsin, 120–134), which take a different view of the implied authority of the cashier to borrow money for his bank; but if these decisions have given rise to a usage in New York and Cincinnati well known and recognized by bankers in both places, and having only the same result which might lawfully

be brought about by express action by each board of bank di-
347 rectors, it is difficult to see why, because the origin of the usage may have been in an erroneous view of the law of implied authority of a cashier, it should not be binding on those who engage in business with a knowledge of, and acquiescence in it.

In *Merchants' Bank v. The State Bank*, 10 Wallace, 604, a suit between two national banks, the question was whether the cashier of one of them had authority to certify three checks, amounting in all to $600,000, to pay for certain gold coin bought of the other. It did not appear that the cashier had ever certified checks before, or bought gold. Evidence by the officers of twenty-two banks in Boston was admitted to show a usage, by which, without by-law or vote, powers were intrusted to cashiers of such banks to borrow and lend the money of their banks of and to each; to buy and sell exchange of and to each other, and in all such transactions to pledge the credit of their respective banks—usually by cashiers' checks; sometimes by certificates of deposit or memoranda; that these transactions were frequent, involving large sums of money, and that they were uniformly conducted in faith of the implied powers of cashier without inquiry. The Supreme Court held the evidence competent for the jury to consider, on the issue, whether the cashier had power to buy gold and certify checks without special authority from the board of directors. The ruling in this case certainly upholds the view that a well-known usage, by which an executive officer of a bank exercises authority to do acts on its behalf, which otherwise could only be done by the directors, is equivalent to a specific delegation of authority by the board. It is worthy of note that the usage, which was here held admissible to show apparent authority, was one by which cashiers were permitted to borrow large sums of money for their banks, without receiving special authority from their directors. It is hardly conceivable that the Supreme Court would have held such usage admissible in evidence, if it was illegal or unreasonable.

Our conclusion is that the complainant, by its proof of usage, has taken this case out of the rule laid down by the Supreme Court in the Western Bank case, and has shown thereby that Harper and Baldwin had apparent authority to make this loan for the Fidelity bank.

Second. The conclusion just reached, based upon the usage of banks, is greatly strengthened when we come to consider the actual authority exercised by Harper in the affairs of the Fidelity bank. It is evident, from the facts set forth at length in the statement of the case, that the board of directors, was practically chosen by Harper for the very purpose of giving him free rein in the management of the bank, and in the use of its funds and its credit to carry on enormous wheat-gambling transactions on the Chicago market. He selected as directors for this purpose, in addition to himself, Baldwin, the cashier, and Hopkins, the assistant cashier, who had previously been engaged in a similar transaction with him at the Third national bank, and who were privy to his present plans; and two of his own employés, Mathews and Gahr, whom

he had qualified by gifts of stock, and who confessedly were only his representatives on the board and quick to do
348 his bidding. When a director manifested any desire to look into his management, he dropped him from the board at the first opportunity. That Harper in this way succeeded in having the whole power of the board of directors delegated to him, in fact, is clearly manifest from what he did in the bank. The indifference of the directors is most emphatically shown by a failure of a quorum to attend the regular monthly meeting for five months, and by the perfunctory and merely formal matters passed upon by the board when a sufficient number did meet. The subordinates in the bank, whose assistance was necessary to Harper in making the transfer of funds to his credit and in carrying in the cash account worthless checks aggregating three times the capital of the bank, recognized Harper as the manager not only of the bank, but of the directors. The slightest questioning of one of them at any time during the last six months would have developed the peculiarities of Harper's control. Indeed, it is quite clear that the flagrant violation of one of their by-laws by Harper, in respect to "cash items," was well known to more than the majority of the board. In order to effect the loan here in question, and other loans, he took from the bank large quantities of the bank's bills receivable, to be used as collateral, without registering any explanation of their whereabouts, and without arousing the slightest inquiry, either by the president or any of the directors. When, near the close, a loan had to be secured in a fruitless effort to save the bank, he negotiated one and sent away a million dollars' worth of bills receivable, without any authority from the board. We think that, for practical purposes, Harper was the bank, and that the directors recognized him as such, and that, included in such a delegation of authority as this condition of affairs implies, was the power to borrow money, if, as held in the Western Bank case, that power rests with the directors. We reach this result not only on the direct evidence, but also upon the bill of the appellant herein filed against the directors, in which the averments paint, in the strongest colors, the supreme authority over bank and directors which Harper was allowed to exercise, and which does not lose evidential force from the fact that the receiver obtained, in compromises, $450,000 from the solvent directors on the character of his averments and the strength of the proof adduced by him in support of them.

In *Martin v. Webb*, 110 U. S., 7, the issue was whether a bank was bound by the act of its cashier in having canceled obligations of its debtor, secured by a first lien on his property, in exchange for a partial payment on them and new obligations secured by a second lien. It was conceded by the court that the ordinary powers of a cashier do not include the release of security and the canceling of any obligation due the bank, except upon payment, but Mr. Justice Harlan, delivering the opinion of the court, set out at some length the circumstances to show that, in fact, the whole business of the bank had been delegated to the cashier by the directors, whose supervision over him was most perfunctory, and who were very

little in the bank, and that if the directors did not abdicate all authority as such, they acquiesced in the cashier's assumption
349 of exclusive management of the bank's business, and held that the directors and the bank could not be heard to deny the requisite authority in the case in hand. Mr. Justice Harlan's language, in closing his opinion, was as follows:

"It is quite true, as contended by counsel for appellants, that a cashier of a bank has no power, by virtue of his office to bind the corporation except in the discharge of his ordinary duties, and that the ordinary business of a bank does not comprehend a contract made by a cashier—without delegation of power by the board of directors—involving the payment of money not loaned by the bank in the customary way. *United States Bank v. Dunn*, 6 Pet., 51; *United States v. City Bank of Columbus*, 21 How., 356; *Merchants' Bank v. State Bank*, 10 Wall., 604. Ordinarily, he has no power to discharge a debtor without payment, nor to surrender the assets or securities of the bank. And, strictly speaking, he may not, in the absence of authority conferred by the directors, cancel its deeds of trust given as security for money loaned—certainly not, unless the debt secured is paid. As the executive officer of the bank, he transacts its business under the orders and supervision of the board of directors. He is their arm in the management of its financial operations. While these propositions are recognized in the adjudged cases as sound, it is clear that a banking corporation may be represented by its cashier—at least where its charter does not otherwise provide—in transactions outside of his ordinary duties, without his authority to do so being in writing, or appearing upon the record of the proceedings of the directors. His authority may be by parol and collected from circumstances. It may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been allowed, without interference, to conduct the affairs of the bank. It may be implied from the conduct or acquiescence of the corporation as represented by the board of directors. When, during a series of years, or in numerous business transactions, he has been permitted, without objection and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between the bank and those who, in good faith, deal with it upon the basis of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operations. Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect the officers of the bank, and to make declarations of dividends. That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

Now, it is quite true that the holding out in the case at bar was of a somewhat different character from that in the case cited. Here the power to transfer the bank's collateral, the acquiescence in the account currents based on the loan for three successive
350 months, the interchange of collateral, the negotiation by Harper of a second loan for $1,000,000 and the transfer of the requisite collateral, were all circumstances reflecting on Harper's authority, upon which the Chemical bank might rely in either making the loan or not compelling its payment by those contracting it, before the failure.

In *Davenport v. Stone*, 104 Mich., 521, 524, the principle is stated as follows:

"The directors intrusted the entire management of the bank to Mr. Bradley (the cashier). Therefore, neither the bank nor its receiver can now be heard to deny the authority of the cashier to do any of those acts which it or its directors might lawfully authorize the cashier to do." The act in question in that case was the rediscount of a renewal note. In *Wing v. The Bank*, 103 Mich., 565, the same principle was recognized, where the act of the cashier, the validity of which was in issue, was the release of a surety from a note held by the bank. In the *City Bank of New Haven v. Perkins*, 4 Bosworth, 420, the issue was like that at bar, as to the binding effect upon a bank of a loan contracted in its name by one of the executive officers. In that case the cashier had had exclusive control of the bank for several years, without any supervision or interference by the directors. This particular loan the cashier had taken to himself after its proceeds came to the bank. The superior court of New York, made up of Chief Justice Bosworth and Judges Woodruff and Moncrieff, stated, as the principle which led them to hold the bank, that where directors of a bank allow its cashier, for several years in succession, without interference or inquiry by them, to transact the business of the bank in such manner as, in his judgment, may be proper and for its interest, they thereby in effect authorize him to make all and any contracts which he deems expedient in relation to its business that the directors might lawfully make, and such contracts will conclude the bank, as between it and a party who has dealt with it through such cashier, and on the faith of his having authority to make such contracts, has loaned money to such bank, provided the charter of the bank does not prohibit it from making such contracts through its cashier. The case was affirmed by the court of appeals on another ground. *City Bank of New Haven v. Perkins*, 29 N. Y., 554. See also, to the same point, *Cox v. Robinson*, 82 Fed. Rep., 277, a decision by the circuit court of appeals for the ninth circuit.

Third. Another distinction between the Western Bank case and the one at bar grows out of the relation which existed between the Chemical bank and the Fidelity bank as correspondent banks exchanging monthly statements of the account between them for the prior month. In the Western Bank case, there was no such relation between the two banks involved. This difference has an important bearing on the question of notice to the directors

and ratification by them of the loan. The Supreme Court, in the Western Bank case, in effect says, that when the loan was made to the Fidelity bank, at the instance of an unauthorized agent, the lending bank could not predicate ratification
351 of the loan by the Fidelity bank without bringing knowledge of the same home to the directors, the only body in the bank with authority to make the loan. The general rule as to ratification is, as we conceive it, that a failure to repudiate the unauthorized act of an agent can never work a ratification of the act, unless the principal either has actual knowledge, or, by the exercise of due diligence, would have had knowledge of the act. Now, due diligence presupposes an affirmative duty owing from the principal to the other party to advise himself of the fact. In the case of a stranger seeking relations with a principal through an unauthorized agent, no duty arises on the part of the principal toward the stranger to inform himself of an agent's unauthorized acts, because he has the right to assume that the agent will not attempt to exercise authority not intrusted to him, and that a stranger will not credit the agent with greater authority than he has. Such was the Western Bank case, and so the principle stated by the court had full application there. But where there is an existing relation between the principal and the other party, imposing on the former a duty of knowledge in respect of a class of facts which embraces the unauthorized act, then a neglect by the principal to discharge the duty and inform himself will have the same effect as actual knowledge upon the issue of his ratification of the unauthorized act by estoppel. To illustrate, by the case of the *Leather Manufacturers' Bank v. Morgan*, 117 U. S., 96. There a depositor in a bank was held to ratify, by estoppel, his agent's forgeries in raising checks by failure to repudiate them, not because of his knowledge, but because his relation to the bank as a depositor bound him to advise himself, from the statements sent by the bank to him, as to the condition of his account, and the validity of the checks, payment of which was noted therein. Had the forgeries been passed upon a stranger, the principal could not have been held to ratify them in favor of the stranger on the ground that he had been careless in not supervising his agent in the drawing of checks. He would, in that case, have owed no duty to the stranger, of which his careless confidence in his agent would have been a violation. In the case at bar, the Fidelity bank bore much the same relation to the Chemical bank that an individual depositor does to his bank. The Chemical bank submitted monthly statements of the current account between it and the Fidelity bank to the latter bank, and in due course the latter bank returned a reconcilement sheet showing discrepancies, if any existed, and correspondence continued until the differences were explained and reconciled. This was the regular course of business between the two banks from the organization of the Fidelity till its close. The affirmative duty was thereby imposed upon the Fidelity bank to inform itself of the correctness of the items therein charged, and to object to the same if unwarranted or erroneous. Negligence in doing so was a failure of duty toward the Chemical bank,

and was the equivalent of actual knowledge of those things which proper inquiry would have developed. Notice through such accounts was notice to the directors of the items therein contained, because it was notice to the Fidelity bank by the course of business
352 between the two banks. The directors cannot rid themselves of such notice by saying that their agents failed to communicate the facts to them. As between them and the Chemical bank, they were under an affirmative duty to examine into the accounts, and so a neglect by the agents to discharge this duty was their negligence. Now, it might be that if the agent who committed the fraud originally was the only person to make the examination, that his failure to report it could be considered so much a part of his scheme to defraud that notice to him would not be notice to the bank. But here no such difficulty arises. The account current for March and the books of the Fidelity bank differed in this, that the account current showed the source of a credit to the Fidelity bank of $300,000, of the date of March 2, 1887, to be a temporary loan from the Chemical bank to the Fidelity bank. The books of the Fidelity bank showed the source of the same credit to be a deposit in the Chemical bank by Harper to the credit of the Fidelity. The book-keepers of the Fidelity negligently overlooked the discrepancy, and, by sending a reconcilement sheet calling attention to other items, in effect, reported to the Chemical bank that the item of $300,000, as contained in the account current, was correctly set forth therein. They were not privy to the fraud, and if they had discovered the difference, it would have been their duty to prepare a letter to be forwarded to the Chemical bank calling attention to it, and to have told the executive officers of the bank of it. The general book-keeper says that he would have reported it to the cashier, but one would think that a discrepancy so vitally concerning the personal account and integrity of the vice-president would be reported to the president. In any event, we cannot presume that such a discrepancy would have been suppressed, if the president, who was certainly not privy to the fraud, had been exercising any care.

If our theory of notice to the directors by the monthly accounts current is correct, then this case cannot be distinguished from the Leather Manufacturers' Bank case, already cited. The grounds for an equitable estoppel, based on the delay in repudiating the loan, are clearly shown. It appears that more than a month after the acquiescence by the Fidelity bank in the account containing the item of the $300,000 loan, the Chemical bank, on the faith that the loan was a loan to the Fidelity bank, consented to a substitution of worthless collateral for good collateral at the instance of Harper, as vice-president. It is also quite probable that had the Chemical bank known that there was any doubt as to Harper's authority in April it would have saved itself from loss by recourse to Harper.

The effect of notice through monthly statements made in due course by one bank to another of unauthorized transactions of agents is clearly shown in the case of *Kissam v. Anderson*, 145 U. S., 435. In that case the president of a country bank drew bank drafts on its New York correspondent bank in favor of New York brokers,

who were conducting a speculation for him. The country bank failed and its receiver sued the brokers for the money of the
353 bank, because received by them on these drafts with knowledge that the president was using the funds of his bank for private speculation. The brokers sought to have the claim reduced by deposits which they had made to the credit of the country bank with its New York correspondent by direction of their client. It appeared that the New York correspondent sent regular monthly statements of the deposit account to the country bank showing these credits, but they were not transferred to the books of the country bank, and some of the accounts thus sent were not even opened. The president drew new drafts on these deposits and squandered the money elsewhere. The circuit court held that unless it appeared that these deposits actually reduced the sum total of the president's total defalcations by whatever means, below the amount of the drafts received by defendants, they could not set off the deposits returned by them. The Supreme Court, in an opinion by Mr. Justice Brewer, reversed the judgment of the circuit court. He said:

"Defendants returned this money to the Albion bank. They deposited it with the Third national bank, the correspondent of the Albion bank, and the bank from which they received the money on the checks from the Albion bank. In fact, therefore, the money was placed where it was before it was taken—in the possession and under the control of the Albion bank. Not only that, the Third national bank, in its due course of business, by monthly reports, informed the Albion bank that they had received this money, and held it subject to its order; and it was subsequently used by the Albion bank in drafts drawn by it in favor of other parties. If it be said that no officer of the Albion bank knew of these deposits except Warner, the wrong-doer, and that he subsequently drew out most of these moneys in drafts to further other wrongs, the reply is, that the other officers and directors of the Albion bank were chargeable with knowledge of these deposits. If, through their negligence, they did not in fact know, that is a matter for which the Albion bank, and not the defendants, were responsible. Kissam, Whitney & Co. had no supervision over its affairs—no knowledge as to how those affairs were managed. They were not called upon to go to Albion and hunt up the various officers and directors and inform them, one by one, personally, that these moneys had been deposited to their credit in the Third national bank. It was enough that they deposited them, and that the bank, in the regular course of business, by monthly statements, informed the Albion bank that it received and held these moneys. * * *

"It will not do to say that they put the money where he could check it out, and therefore are responsible for what he did with it. They deposited it to the credit of the Albion bank, and it was for the officers and directors of that bank to take care of its deposits. The rule might be different if Warner, the cashier of the Albion bank, was the only officer authorized to draw on the Third national bank, or charged with knowledge of the state of the account; but the president and teller had equal authority, and were equally

chargeable with knowledge; in fact, it appears that these officers did draw drafts on the New York bank, and thus diminished
354 the total amount of deposits, and the other directors, also, were under some obligation to know the affairs of the bank; and it will not do to say that the bank can ignore the negligence of all its officers and profit by their omission of duty."

The same effect was given by Judge Drummond to monthly accounts current between correspondent banks in *Burton v. Burley*, 13 Fed. Rep., 811, where a bank president had paid his personal debts by directing charges to be made upon the correspondent bank's books against his own bank.

Fourth. Another distinction said to exist between the case at bar and that of the Western national bank is, that there the money borrowed from the Western bank was at once drawn out by drafts payable to Harper, and not a penny of it went to the benefit of the Fidelity; while here, the credit of $300,000 obtained by the loan was drawn out on drafts issued to meet legitimate obligations of the Fidelity bank. Upon the day upon which the credit was given in New York to the Fidelity bank by the Chemical bank for the loan, however, Harper directed a credit to be made in his favor on the Fidelity books of $300,000, and a charge of that amount to the Chemical bank, and he afterward checked out this credit. Under the circumstances, can the Chemical bank hold the receiver as for money had and received?

The question is not free from difficulty, and as the members of the court might not be able to agree in their conclusions upon the same, and as the grounds already stated are quite sufficient to require the court to affirm the judgment of the circuit court, we do not decide the point.

The decree of the circuit court is affirmed, with costs.

355 And afterwards, to wit, on March 8, 1898, a petition for appeal to the Supreme Court was filed in said cause in said court, which reads and is as follows:

Petition for Appeal.

356 United States Circuit Court of Appeals, Sixth Circuit.

DAVID ARMSTRONG, Receiver of the Fidelity National Bank of Cincinnati, Ohio, Appellant,
vs.
THE CHEMICAL NATIONAL BANK OF NEW YORK, Appellee.
} No. 473.

Petition on appeal.

And now comes the said plaintiff and appeals this cause to the Supreme Court of the United States and presents his assignment of errors, which are herewith filed, and prays that this appeal may be allowed, and that a transcript of the record and proceedings and papers from which the decree and orders in this cause have been

made, duly authenticated, may be sent to the Supreme Court of the United States, and that the bond to be given by him herein may be fixed by this court and duly approved as his said appeal fully purposes.

JOHN W. HERRON AND
F. F. OLDHAM,
Solicitors for Complainant.

357 And afterwards, on the same day, to wit, on March 8, 1898, assignments of error were filed in said cause in said court, which read and are as follows:

Assignments of Error.

358 United States Circuit Court of Appeals, Sixth Circuit.

DAVID ARMSTRONG, Receiver of the Fidelity National Bank of Cincinnati, Ohio, Appellant,
vs.
THE CHEMICAL NATIONAL BANK OF NEW YORK, Appellee.
} No. 473.

Assignment of errors.

Now comes the said plaintiff and presents this his assignment of errors to the judgments and decrees of the court in this cause, to wit:

1st. That said court erred in finding that there was due to the said defendant from the Fidelity national bank on the 21st day of June, 1887, the sum of three hundred and five thousand four hundred and fifty dollars ($305,450) or any other sum.

2nd. The court erred in finding that the said defendant, on the 2nd day of March, 1887, loaned to the Fidelity national bank the sum of three hundred thousand dollars ($300,000) or any other sum.

3rd. The court erred in finding that the several sums which had been paid to the defendant prior to the declaration of dividends by the plaintiff from collaterals sent to it, as stated in the pleadings, should not be deducted from the amount of such alleged loan in determining the sum upon which dividends to the defendant should be paid.

4th. That the court erred in finding that the sum of twenty-five thousand dollars ($25,000) which the defendant failed to collect from John B. Lewis, as stated in the answer of plaintiff,
359 should not be deducted from the said alleged claim in determining the sum upon which dividends to defendant should be paid.

5th. That the court erred in finding that the defendant is entitled to dividends upon the sum of three hundred and five thousand four hundred and fifty dollars ($305,450).

6th. That the court erred in refusing to compel the defendant to exhaust the collaterals held by it as security for said alleged loan

before ordering the dividends on the same to be paid to it and in ordering dividends to be paid to defendant upon said alleged claim without reference to the collaterals still held by it.

7th. Said court erred in finding that the defendant is entitled to interest on the several dividends declared by plaintiff in favor of the president of the Fidelity national bank from the date of the presentation of the alleged claim to the plaintiff as to dividends declared prior to that date and from the date of the declaration of dividends as to those declared after that date.

8th. That the court erred in refusing to find that the said alleged loan of three hundred thousand dollars ($300,000) claimed to have been made on the 2nd day of March, 1887, by the defendant to the Fidelity national bank was without the authority of the board of directors of said bank and for which said bank was not liable.

9th. The court erred in affirming and in refusing to reverse the decree of the circuit court in this cause entered on the 13th day of October, 1896.

JOHN W. HERRON AND
F. F. OLDHAM,
Solicitors for Plaintiff.

360 And afterwards, on the same day, to wit, on March 8, 1898, an order was entered upon the journal of said court in said cause, which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

DAVID ARMSTRONG, Receiver Fidelity National Bank,
v.
THE CHEMICAL NATIONAL BANK OF NEW YORK. } No. 473.

The plaintiff, David Armstrong, receiver, having filed his petition for appeal of the above cause to the Supreme Court of the United States, together with his assignments of error therein, the court now doth, upon the application of his attorneys, allow the said appeal, and doth fix the appeal bond in the sum of one thousand ($1,000.00) dollars.

March 8, 1898.

WM. H. TAFT,
Circuit Judge and Presiding Judge of Court of Appeals in Above Cause.

And afterwards, to wit, on March 11, 1898, an appeal bond was filed in said court in said cause, which is in the words and figures following:

361 Know all men by these presents that we, David Armstrong, receiver of the Fidelity National Bank of Cincinnati, as principal, and Joseph Rawson, as surety, are firmly bound unto the Chemical National Bank of New York in the full and just sum of one thousand dollars, to be paid to the said Chemical National Bank of New York, certain attorneys, executors, administrators, or assigns;

to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 11 day of March, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, at a term of the United States circuit court of appeals for the sixth circuit, in a suit depending in said court between David Armstrong, receiver of the Fidelity National Bank of Cincinnati, appellant, and Chemical National Bank of New York, appellee, a decree was rendered against the said David Armstrong, receiver of the Fidelity National Bank of Cincinnati, and the said David Armstrong, receiver of the Fidelity National Bank of Cincinnati, having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said Chemical National Bank of New York, citing and admonishing it to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington, D. C., on the — day of —— next:

Now, the condition of the above obligation is such that if the said David Armstrong, receiver of the Fidelity National Bank of Cincinnati, shall prosecute said appeal to effect and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

362 Sealed and delivered in the presence of—

DAVID ARMSTRONG, *Receiver*,
By JOHN W. HERRON, *Att'y.* [SEAL.]
JOSEPH RAWSON.

Approved by—
WM. H. TAFT,
Circuit Judge.

363 UNITED STATES OF AMERICA, } ss:
Sixth Judicial Circuit, }

United States Circuit Court of Appeals for the Sixth Circuit.

To Chemical National Bank of New York, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden at the city of Washington, D. C., on the 18th* day of April next, pursuant to an appeal filed in the clerk's office of the United States circuit court of appeals for the sixth circuit, wherein David Armstrong, receiver of the Fidelity National Bank of Cincinnati, Ohio, is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 19th day of March, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence

of the United States of America the one hundred and twenty-second.

WM. H. TAFT,
Circuit Judge.

* Not exceeding 30 days from the day of signing.

364 [Endorsed:] I acknowledge service of a copy of the within citation on me this 19th March, 1898. The Chemical National Bank, by Wm. Worthington, solicitor.

365 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of the printed record used at the hearing and of all of the proceedings in said court in the case of David Armstrong, rec., etc., *vs.* Chemical Nat. Bank of New York, No. 473, October term, 1897, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

Seal United States Circuit Court of Appeals, Sixth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the sixth circuit, at the city of Cincinnati, Ohio, this 19th day of March, 1898.

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

Endorsed on cover: Case No. 16,849. U. S. C. C. of appeals, 6th circuit. Term No., 279. David Armstrong, receiver of the Fidelity National Bank of Cincinnati, Ohio, appellant, *vs.* The Chemical National Bank of New York. Filed April 13, 1898.

WATTERS' EXHIBIT No. 10.

Fidelity national bank, Cincinnati, O., in account with Chemical national bank.

DR. March, 1887.				CR.			
1	Ret'd		$3,001 11	1	Balance		$24,360 65
2	"		112 58	2	M'ch'ts', Atlanta		8,500
1	Imp. & Tra. bk. Cr. N. Scoby & Co.		10,000	2	Wellington & Co.		471 32
	10630	$3,000			Tem. loan		300,000
	530	40 84		2			122,651 88
			$3,040 84		Riverside Iron & S. Co.		6,364 08
2	10586	50		1	Brown	$1,300	
	143	50			Shaller	5,793 09	
	347	25 10					7,092 09
	86	117 81			Huzard	2,452 36	
	450	51			Remington	1,383 25	
	44	4 01					3,835 61
	75	199 18			Kuny		27 25
	92	43 95		3	1 Ashville	5,000	
	36	186 28				99,684 21	
	52	99 80					104,684 21
	46	160			Jas. Loenbren		451 50
	511	50			Easter	2,388 66	
	55	301 75			Remington	441 78	
	0	112 80					2,830 44
	93	21 62		4	1 Wellington	402	
	6	292 37				44,764 49	
	58	1,203 42					45,227 08
	80	35			3 Chattanooga		5,000
	39	50,000			Haysen & Reynolds		1,184 23
	44	30,000		5		63,246 07	
	644	7,000			Com. Det.	4,000	
	01	300			Savannah	6,000	
	5	5					73,246 07
	33	2,000			Swift Iron & S. Co.		5,772 84
	8	15,000		7		84,678 86	
			107,309 09			118,190 14	
	557		25		Mer., Atlanta	5,000	
	Cy. Ex. Union Nat., Cleveland		20,000		1 Ashville	10,000	
3	Ret'd		138 61				217,869 00
	9882	150			Worth		1,643 26
	10142	310			Brooks		4,087 19
	365	20		7	Brown	353 95	
	499	1 65				1,135 88	
	508	200					1,489 83
	28	61 74			Thatcher		1,414
	22	102 40			Foster		1,158 32
	14	25 79		9	S. E. & M. Vernon		98 46
	49	113 08					100,235 92
	52	64 35		10	Sargent		500
	68	868 98			Tradesman N. bk., ac. Marnee B., Pittsburg		7,500
	75	33 33					79,764 14
	53	451 01		10	Allen		43 30
	10	35		11	Bk. Ohio Valley	7,500	
	78	512 57				160,559 97	
	76	671 13					168,059 97
	554	28 14		12	Steinhardt Bro.		534 06
	669	2,000					135,409 27
	49	101 27		12	Thatcher		941 45
	24	12 50			Carnnall		24
	79	5,000		13	Tradesmen's		7,500
	31	352 92			Error, ch'g'd Jan. 10, '87		899 27
	55	13 10		14		83,844 78	
	56	32 80		15		87,681 31	
	661	102 47					171,526 09
	66	3,000			1 Ashville	10,000	
	32	170			Mere., Atlanta	15,000	
	21	107 62					25,000
	78	5,000		15	Brown		2,203 40
	52	79 68			Lamb		3,785 72
	53	800		16		107,695 28	
	60	898 12			Bk. Ohio Valley	5,000	
	08	750					112,695 28
	45	242 79		17			49,394 15
	46	302		18	A. T. Reid		207 37
	54	433				79,746 28	
	34	357 39			Ohio Valley	12,000	
	48	12					91,746 28
	50	2		18	Lindsey, Sr.		1,034 55
	26	4,000		19	S. Meyer & Allman		1,039 51
					Mr., Atlanta	20,000	
				17		99,853 73	
							119,853 73
				19	Hazard		1,041 23
					Worth		1,593 80
				21	Catochin Iron Co.		2,953
						88,840 83	
						183,711 21	
					5th, St. Louis	10,000	
							282,552 04
					Eckbach, 2-10-8		9 33
				23			106,256 09

2 *Watters' Exhibit No.* 10—(Continued).

Fidelity national bank, Cincinnati, O., in account with Chemical national bank.

Dr.				Cr.	
			$27,418 83*	$143,627 23*	$2,414,362 26*
	10664	2,000			
	702	3,981 42			
	11	15,000			
	10	20,000			
				68,400 25	
	676			10,000	
4	10647	78 13			
	94	1,700 47			
	81	48			
	82	9,235 81			
	75	35 77			
	41	50			
	80	10,000			
	89	4,462 06			
	90				
	98	3,998 42			
	93	10,000			
	40	1,325			
	35	18 02			
	758	180 66			
	10081	8			
	344	25			
	495	211 51			
	542	57 47			
	405	100			
	517	4 44			
		8			
	56	300			
	636	35			
	88	7,408 02			
	95	276 45			
	86	9,131 31			
	20	61 07			
	65	5,000			
	68	20,000			
	14	83 80			
	37	38 03			
	59	200			
	77	1,000			
	705	24 55			
	85	750			
	07	4,400			
	04	15 99			
	78	4,933 95			
	72	843 82			
	82	50,000			
	08	1,200			
	30	1,000			
	804	5,000			
	3	5,000			
	5	7,000			
				165,248 85	
	643			25	
	Ret'd end			3	
	Ed. K. Stallo's transferred			5,200	
	4 Nat. Cr. bk., Granville, O			6,000	
	L. A. & Co. Cr. Bk. of Mearar, Jackson, Tenn			7,000	
	10757	503 25			
	815	10,082 67			
	56	179 40			
	700	175			
				10,940 32	
5	10043	2,761 69			
	363	29 75			
	37	25 50			
	411	4 44			
	78	15 06			
	584	175			
	86	2,700			
	36	225			
	639	9 40			
	29	87 40			
	72	5,000			
	71	7,000			
	99	100			
	03	100			
	92	145 54			

* Figures marked with an asterisk (*) are written with lead pencil in the original.

3 *Watters' Exhibit No.* 10—(Continued).

Fidelity national bank, Cincinnati, O., in account with Chemical national bank

Dr.			Cr.
	$18,378 78*	$416,444 65*	$2,414,362 26
10697	22 87		
22	21 50		
96	7,483 21		
23	75		
84	695 76		
91	1,935 40		
774	746 30		
73	949 91		
53	329 92		
62	975 15		
88	11,843 76		
99	303		
33	318 11		
67	293 50		
54	1,282 86		
44	1,079 49		
91	601 25		
92	307 85		
51	84 52		
59	1,024 64		
05	18 64		
43	452 70		
20	1,389 99		
48	578 46		
42	873 28		
97	3,481 94		
55	1,612 20		
41	778 46		
80	100		
22	30 85		
24	35		
39	27 67		
63	134		
56	1,530 82		
99	15		
36	1,037 13		
45	1,174 19		
69	530 55		
66	155 27		
61	686 18		
13	73 93		
94	548 92		
75	125 30		
40	188 22		
89	1,419 10		
37	1,259 46		
86	1 70		
27	101 80		
58	590 82		
95	601 12		
835	1,000		
62	450 11		
14	6,214 89		
50	5,000		
34	3,000		
09	47 38		
10	44 23		
31	5,000		
01	522 49		
07	2,781 51		
33	2,000		
06	99 80		
02	4 82		
32	1,000		
57	2,517 85		
		97,988 56	
7 Cash		64	
		3,500	

*Figures marked with an asterisk (*) are written with lead pencil in the original.

Fidelity national bank, Cincinnati, Ohio, in account with Chemical national bank.

Dr.			Cr.
		$617,997 21*	$2,414,362 26*
6962	$500		
9085	109 50		
10322	35 13		
483	4 55		
512	1,341 90		
79	3,000		
663	3 62		
25	234		
83	336 15		
19	121 25		
74	27		
58	549 75		
42	95		
720	100		
25	20 84		
60	73 98		
38	190		
46	9 80		
28	391 12		
26	21 46		
68	20 25		
84	19		
47	35 95		
21	58 63		
16	15		
76	734 06		
50	1,360 94		
34	548 44		
64	1,332 59		
87	25		
52	217 65		
14	29 80		
854	46 67		
28	10,457 12		
64	77 42		
81	9,996		
20	2,320 70		
95	215 04		
58	40 43		
46	590 74		
16	4,879 61		
17	2,087 07		
22	3,270 96		
68	10,000		
67	500		
26	6,969 36		
13	3,698 87		
18	2,062 55		
69	5,000		
47	499 80		
63	3,524 10		
00	61 33		
61	45 16		
19	2,077 46		
96	890 55		
59	700		
79	1,000		
21	2,406 41		
44	86 20		
78	5,000		
25	3,043 59		
45	188 76		
77	2,000		
12	6,198 75		
29	3,146 54		
43	282 16		
24	1,552 33		
55	12		
08	69 80		
51	34 78		
65	9 82		
955	50,000		
42	50,000		

* Figures marked with an asterisk (*) are written with lead pencil in the original.

5 *Watters' Exhibit No.* 10—(Continued).

Fidelity national bank, Cincinnati, Ohio, in account with Chemical national bank.

Dr.			Cr.
		$517,997 21*	$2,414,362 26*
10956	$40,000		
48	1,000		
50	5,000		
11	5,000		
69	1,342 93		
07	1,012 10		
52	3,000		
62	5,000		
		268,557 47	
921	97 71		
22	219 06		
838	800		
953	1,500		
811	5,234 50		
735	207 80		
823	6,426 28		
965	15,000		
		29,485 35	
958	1,000		
57	1,000		
10202	10		
429	35		
590	20		
31	24 55		
51	20		
90	34 27		
71	7 50		
31	67 25		
49	225 49		
32	187 01		
79	16		
703	100		
65	257 24		
18	1 40		
882	59 74		
53	100		
97	49 80		
89	20 40		
60	111 38		
84	9 68		
75	9 30		
66	458		
87	500		
39	6		
37	161 80		
73	2 16		
88	500		
908	999 60		
68	27 70		
33	37 89		
45	52		
18	105 67		
57	129 13		
29	28 58		
54	1,000		
39	6 71		
26	15 51		
10	1,544 05		
67	58 80		
00	95 80		
04	599 75		
61	69 80		
14	167 18		
17	54 40		
05	74 80		
02	42 82		
30	143 09		
25	12 32		
32	509		
15	181		
19	451 36		
51	191 19		
38	10,000		
03	4,000		
15	43 25		
49	163 34		
	188 44		
		25,987 15	

* Figures marked with an asterisk (*) are written with lead pencil in the original.

Fidelity national bank, Cincinnati, Ohio, in account with Chemical national bank.

Dr.			Cr.	
			$42,027 14*	$2,414,362 26
	759	$29 80		
	701	100		
		129 80		
3	Cert. 10662	20,000	20,000	
	" 783		25,000	
9	Cash		53	
	"		30 60	
	"		22 75	
9	8682	100		
	80	100		
	9330	10 70		
	10364	166 66		
	687	44 43		
	781	35		
	12	57 40		
	70	161 52		
	98	27 30		
	836	100		
	40	10 69		
	90	79 46		
	72	1 77		
	30	8 82		
	85	22 58		
	76	19 64		
	74	14 18		
	86	6 57		
	991	5,000		
	20	463 21		
	35	35		
	89	2,000		
	95	3,000		
	40	12		
	34	224 60		
	12	94 73		
	93	10,000		
	88	50,000		
	23	91 10		
	36	12 50		
	92	5,000		
	27	39 73		
	44	40 52		
	87	2,000		
	43	48		
	028	4,782 16		
			83,810 27	
	16947		900	
	Imp. and Tra. Cr. A. Gobys Cr.		10,000	
10	Ret. Pro.		26 84	
	" "		2 42	
	0464	25		
	618	15		
	28	6 66		
	777	153		
	06	6 87		
	6841	2 75		
	48	2,000		
	964	60		
	98	16		
	31	123 43		
	66	26 23		
	60	2 32		
	58	100		
	90	5,000		
	94	500		
	901	411 56		
	96	200		
	72	162		
	001	273 06		
	34	175 39		
	76	4,561 54		
	06	2,374 53		
	24	364 10		
	71	1,000		
	23	179 25		

*Figures marked with an asterisk (*) are written with lead pencil in the original.

7 *Watters' Exhibit No.* 10—(Continued).

Fidelity national bank, Cincinnati, Ohio, in account with Chemical national bank.

Dr.			Cr.
		$982,002 86*	$2,414,362 20*
1000	$59 05		
041	5,000		
30	325 11		
32	1,005 25		
11	5,973 18		
08	3,159 81		
38	8 75		
53	12,000		
44	3,000		
10	1,585 93		
27	17 51		
12	2,179 92		
07	4,305 27		
43	1,000		
20	4 74		
02	15,760 65		
47	20,659 91		
09	254 96		
		94,038 73	
11 Cash ret. unp'd		14 50	
" " "		1,500	
" " "		2,500	
581	25 25		
717	40		
23	9		
19	100		
898	49 80		
99	299 80		
78	19 49		
74	11 10		
924	1,467 17		
81	7 50		
84	79 30		
82	4 42		
79	45 76		
71	40		
86	1,000		
60	466 70		
69	1,471		
78	5,000		
015	460		
66	366 60		
70	713 86		
68	369 88		
35	3 85		
65	397 84		
05	852 08		
42	1,000		
03	3,399 51		
26	30 08		
16	85 68		
63	428 37		
50	13 75		
22	80		
64	651 36		
62	1,643 03		
38	25		
87	7,500		
56	341 75		
58	1,188 27		
25	50		
55	391 30		
13	177 11		
46	14,272 08		
54	96 86		
77	1,000		
61	546 49		
07	842 91		
72	764 55		
14	725 04		
		48,553 54	
49	100		
21	171		
41	56 87		
42	20 25		
		348 12	

* Figures marked with an asterisk (*) are written with a lead pencil in the original.

Fidelity national bank, Cincinnati, in account with Chemical national bank.

Dr.	March.				Cr.
			$1,128,957 75*		$2,414,362 20*
12	796	$28			
	1103	2,000			
	0928	21 39			
	852	50			
	997	200			
	37	25			
	11121	4,000			
	996	1,497 39			
	267	50			
	73	431 12			
	406	4 44			
	980	72 66			
	77	25			
	79	2,000			
	99	1,000			
	91	442 45			
	04	2,228 81			
	36	3			
	74	76 60			
	86	1,195 59			
	37	14 74			
	51	225 47			
	84	700			
	28	3,000			
	101	1,500			
	02	8,000			
	04	5,000			
	00	2,688 95			
	25	15,000			
	07	20,000			
	06	5,000			
	61	10			
			76,490 61		
	134	514 57			
	32	1,027 76			
	08	499 30			
	30	10,000 00			
	24	15,000 00			
			27,041 63		
14	9775	100			
	10248	57 25			
	480	100			
	892	100			
	975	4 25			
	46	12			
	73	13 55			
	70	13 37			
	11057	94 10			
	95	50			
	45	2 49			
	29	40			
	90	74 75			
	82	580 81			
	75	29 80			
	59	1,246 70			
	85	143 67			
	39	17 50			
	49	327 62			
	93	120			
	33	749 70			
	52	508 27			
	97	75,000			
	89	18 21			
	92	51 89			
	31	294 05			
	135	503 97			
	20	34 78			
	45	70 12			
	18	18 49			
	93	7,072 48			
	68	15,000			
	12	57 41			
	44	70 87			
	41	111 29			

* Figures marked with an asterisk (*) are written with lead pencil in the original.

9 *Watters' Exhibit No.* 10—(Continued).

Fidelity national bank, Cincinnati, O., in account with Chemical national bank.

Dr. March.				Cr.
		$102,080 39*	$1,232,489 39*	$2,414,362 26*
14	11137	295 64		
	27	5,000		
	16	69 09		
	30	286 50		
	52	34 88		
	65	2,000		
	51	46 06		
	60	5,000		
	64	5,000		
	62	1,000		
	61	5,000		
	66	2,000		
	69	5 80		
	36	355 10		
	63	1,000		
	105	1,000		
	19	48 65		
	67	10,000		
	59	10,000		
	49	51 65		
	39	219 83		
	26	416 80		
	10	172 94		
	11	249 12		
	54	199 80		
	90	2,015 41		
	33	525 90		
	47	63 85		
	09	197 82		
	31	2,826		
	14	1,093 08		
	64	440 08		
	269	3,645 54		
	12	429 66		
	66	5,000		
	90	5,000		
	02	225 49		
	48	447 89		
	37	1,000		
	60	19,103 85		
	74	5,000		
	91	5,000		
			204,155 82	
	36	1,200		
	65	15,000		
	95	202 74		
			16,402 74	
15	7410	100		
	12	100		
	11	100		
	08	100		
	09	100		
	10541	34 46		
	883	15 07		
	983	3		
	76	32		
	99	125		
	10993	54		
	11048	400		
	81	100		
	88	2 77		
	140	176 71		
	96	1,928 23		
	75	3,780 35		
	97	140 34		
	74	472 99		
	70	228 15		
	94	1,582 04		
	86	1,968 02		
	77	225 90		
	99	1,977 50		
	78	2,160 84		
	85	1,154 92		
	76	1,035 37		

* Figures marked with an asterisk (*) are written with lead pencil in the original.

10 *Watters' Exhibit No.* 10—(Continued).

Fidelity national bank, Cincinnati, in account with Chemical national bank.

DR. March. CR.

	$18,097 66*	$1,453,048 55*	$2,414,362 26*
179	1,134 82		
88	2,650 10		
89	2,093 39		
46	68 63		
92	2,314 69		
80	874 54		
48	57 63		
50	52 90		
43	75 62		
73	4,810 49		
53	16 78		
98	152 73		
15	52 17		
230	163 73		
79	1,268 07		
76	901 15		
59	136		
81	70 12		
75	900		
58	10		
82	14 55		
20	135 66		
62	6 50		
27	105 84		
34	227 10		
17	7,762 97		
80	989 16		
84	1 67		
88	1,000		
35	3,000		
61	52 23		
45	1,481 43		
52	473 10		
23	1,749 99		
14	1,448 46		
32	22 25		
57	58 14		
07	1,191 32		
40	4,297 73		
44	2,056 26		
97	6 85		
21	313 65		
33	386 23		
56	72 05		
22	5,522 33		
18	9,012 86		
04	1,279 18		
56	34		
03	4,245 65		
31	106		
85	1 07		
01	1,829 53		
302	255 62		
21	5		
00	1,088 60		
09	132 70		
11	621 45		
12	265 20		
20	17		
03	104 18		
08	89 40		
05	56 50		
		87,130 63	
260	4,443 60		
51	3,188 14		
301	153 08		
Duplicate, 10526	145 25		
		7,930 07	
16 Cash ret. date		38 20	
Ret. pay		89 85	

* Figures marked with an asterisk (*) are written with lead pencil in the original.

11 *Watters' Exhibit No.* 10—(Continued).

Fidelity national bank, Cincinnati, Ohio, in account with Chemical national bank.

Dr.	March.		Cr.
		$1,548,237 30*	$2,414,362 26*
16	8626	100	
	9788	100	
	10490	200	
	122	45 93	
	83	3,270 04	
	87	4 57	
	13	22 06	
	82	562 06	
	84	78 76	
	17	1,031 55	
	42	81 43	
	72	1	
	219	1,747 75	
	16	3,929 47	
	95	9,937 50	
	55	950	
	72	24 65	
	39	5,652 48	
	96	18 10	
	68	35 30	
	92	2,000	
	205	3,063 45	
	29	123	
	49	65 25	
	53	131 33	
	86	520 07	
	89	1,700	
	25	35	
	08	187 40	
	10	138 48	
	06	322 54	
	11	20 47	
	42	18 15	
	09	941 63	
	70	50	
	78	15,000	
	314	7	
	70	1,000	
	68	3,000	
	17	302 42	
	63	3,782 36	
	77	3,000	
	30	8,121 08	
	80	5,000	
	15	2,499	
	76	5,000	
	73	3,000	
	06	35 25	
	10	37 20	
	54	3,549 55	
	71	2,000	
	75	4,000	
	74	1,000	
	16	29 30	
	72	5,000	
	92	1,476 26	
			103,948 83
	247	474 99	
	349	63 13	
			538 12
17	Cash		33 26
	Ret. unp'd		2 50
17	10870	40	
	1156	8 80	
	55	100	
	23	530	
	81	1,747 56	
	91	1,315 25	
	58	11 20	
	57	16 25	
	240	25	
	87	130 42	
	63	50	
	98	875	

*Figures marked with an asterisk (*) are written with a lead pencil in the original.

Fidelity national bank, Cincinnati, Ohio, in account with Chemical national bank.

Dr.	March.			Cr.
		$4,054 48*	$1,652,760 01*	$2,414,362 26*
	340	25 26		
	90	2,200		
	53	249 75		
	52	16 17		
	31	13,929 80		
	29	419		
	27	905 83		
	37	7,954 34		
	82	20 13		
	98	1,000		
	07	589 60		
	62	158 89		
	51	384 51		
	34	1,614 88		
	85	55 72		
	86	12		
	18	105 68		
	69	10,000		
	48	93 49		
	88	301 51		
	429	2,500		
	08	3,000		
	17	4,000		
	00	15,000		
	07	3,000		
	13	2,500		
	15	2,500		
			76,681 04	
	223	112 55		
	28	100		
	94	13 65		
	15	130 25		
	13	21 10		
	35	4,917 04		
	13	139		
	32	10,364 75		
	95	2,998 80		
	26	69 81		
	94	1,749 59		
	93	1,706 43		
	28	15,039 10		
	36	2,591 64		
			40,553 71	
	81	50		
	93	500		
	40	5		
			555	
18	Cash ret. unp'd		115	
	Ret. "		46	
	Cash		3,001 33	
18	9649	100		
	10385	2,525 88		
	241	921 95		
	26	27		
	54	75		
	38	25		
	85	12 50		
	325	15 47		
	38	963 58		
	39	50		
	78	15,000		
	79	15,000		
	50	48 39		
	33	68 50		
	61	1 40		
	32	27 80		
	421	96 52		
	45	244 40		
	82	4,013 79		
	39	15,000		
	38	57 40		
	25	95 53		
	40	41 35		
	48	3,000		
			57,411 46	
	68		61 83	

* Figures marked with an asterisk (*) are written with lead pencil in the original.

13 *Walters' Exhibit No.* 10—(Continued).

Fidelity national bank, Cincinnati, O., in account with Chemical national bank.

Dr.	March.			Cr.
			$1,831,185 38*	$2,414,362 26*
19	Ret. unp'd		147 63	
	" date		24	
	" end		11 50	
	" ret		201 21	
	10341	200		
	500	5		
	627	63 37		
	963	5		
	1290	50		
	324	37 80		
	64	1 60		
	66	1 90		
	42	20		
	65	99 80		
	87	9 88		
	47	23 23		
	436	539 70		
	73	2,325 25		
	92	3,000		
	64	84 60		
	44	952 04		
	20	17 42		
	09	208 13		
	67	39 10		
	12	51 93		
	59	406 25		
	16	107 90		
	30	2 20		
	23	400		
	68	238 83		
	04	1 20		
	57	727 18		
	62	422 19		
	18	585		
	54	50		
	06	68 70		
	05	7 91		
	11	114 60		
	49	10,000		
	70	119 59		
	86	8 32		
	66	31 82		
	01	32 35		
	534	312 04		
	16	2,000		
	18	10,000		
			33,371 83	
	23	155 10		
	19	21,620 02		
	91	1,500		
	58	205		
	02	390 77		
			23,870 89	
21	Ret. pro		59 35	
	" "		151 16	
	" "		501 16	
	9647	100		
	11171	118 05		
	207	1,000		
	383	350		
	43	50		
	04	4		
	23	2 23		
	84	19		
	99	12 06		
	96	29 80		
	71	57 75		
	19	23 85		
	63	65 48		
	85	28 60		
	43	222 55		
	61	264 93		
	47	57 16		
	79	978 54		

* Figures marked with an asterisk (*) are written with lead pencil in the original.

14 *Watters' Exhibit No. 10—(Continued).*

Fidelity national bank, Cincinnati, in account with Chemical national bank.

Dr. March.				Cr.
		$3,384*	$1,889,524 11*	$2,414,362 26*
	494	5,000		
	50	10,000		
	93	5,000		
	37	149 80		
	74	599 75		
	84	90 12		
	97	50 76		
	98	69 63		
	51	25		
	96	999 60		
	77	25		
	53	466 67		
	43	2,000		
	504	60		
	87	5,000		
	06	124 79		
	35	645 52		
	42	1,000		
	86	5,000		
	52	10,000		
	20	9,000		
	72	50,000		
	48	25,000		
	50	50,000		
	01	32 85		
	51	15,000		
	59	126 88		
	13	200 00		
	45	2,000		
	41	3,000		
	25	200		
	61	298 30		
	29	2 92		
	07	46 88		
	27	1,000		
	44	2,000		
	17	10,000		
	12	39 50		
	11	25		
	31	439 77		
	02	52 59		
	08	49 25		
	22	588 57		
	32	690 58		
	617	4,000		
			223,483 73	
	593	401 11		
	88	5,000		
	75	799 70		
			6,200 81	
	Dep. with ass't treas.		100,000	
	Pre. on 100,000 ordered on ass't treas		75	
22	Ret. end		167 50	
	" pro		251 16	
	" "		501 16	
	" "		61 11	
	" "		44 86	
21	9877	100		
	11083	28		
	273	31 80		
	342	250		
	91	300		
	431	40		
	72	4,758 75		
	80	72 50		
	60	204 83		
	81	122		
	56	50		
	46	44 29		
	65	76 92		
	504	44 55		
	58	228 69		
	70	57 62		
	05	92		

* Figures marked with an asterisk (*) are written with lead pencil in the original.

15 *Watters' Exhibit No.* 10—(Continued).

Fidelity national bank, Cincinnati, Ohio, in account with Chemical national bank.

Dr. March.			Cr.
	$6,501 95*	$2,220,309 44*	$2,414,362 26*
554	52 65		
69	119 39		
94	282 06		
03	36 43		
74	218 66		
92	10 34		
65	19 80		
47	17 72		
78	12 30		
98	20 20		
96	21 40		
56	110 04		
95	87 19		
30	138 30		
99	29 30		
97	580 28		
21	30		
00	53 81		
64	8 82		
634	1 75		
07	17 12		
09	500		
00	470 57		
03	12 15		
15	2,953 25		
16	2,524 25		
10	500		
02	3 35		
21	301 93		
08	115 80		
14	50		
		15,800 81	
414	50		
619	1,000		
		1,050	
23 Ret. end		1,460	
" unp'd		175	
" "		6 21	
" end		10	
" pro		401 25	
" "		251 21	
" unp'd		45 68	
" end		13 68	
10871	15		
1129	50		
76	4,200		
452	57		
87	44 75		
03	30 66		
574	150		
55	124 93		
46	52 91		
60	30 67		
37	2,800		
85	6 08		
89	30,000		
91	1		
67	2,000 07		
68	819 70		
79	326 10		
626	20 05		
22	125 52		
11	250		
20	99 68		
35	62 50		
06	26 76		
27	99 80		
734	100		
07	3,988 55		
63	11,080 49		
55	15,000		
64	50,000		
66	8,000		
10	500		
		130,072 22	
601		7 25	

* Figures marked with an asterisk (*) are written with a lead pencil in the original.

Fidelity national bank, Cincinnati, Ohio, in account with Chemical national bank.

Dr. March.			Cr.
		$2,369,602 75*	$2,414,362 26*
24	Ret. pro	1 11	
	10893	12	
	1427	100	
	28	100	
	540	299 80	
	90	7 95	
	57	90	
	76	50	
	84	500	
	53	222	
	33	72 70	
	09	60	
	633	16 55	
	32	199 80	
	69	295 94	
	78	2,843 28	
	92	166 52	
	94	3,513 56	
	48	2,306 49	
	74	102 56	
	68	2,062 80	
	44	729 30	
	62	1,648 75	
	56	227 08	
	82	668	
	47	3,952 20	
	43	2,651 48	
	88	970 45	
	95	2,980 62	
	71	3,025 78	
	60	2,409 20	
	99	1,044 23	
	58	358 77	
	39	20	
	39	94 35	
	24	51 29	
	23	260 14	
	70	641 50	
	77	569 37	
	709	831 74	
	642	175	
	05	1,342 29	
	75	919 96	
	49	1,281 81	
	41	584 03	
	85	1,669 67	
	65	1,375 25	
	66	12,227 75	
	81	1,035 14	
	50	2,257 51	
	98	2,725 26	
	73	151 41	
	72	1,875 44	
	64	114 58	
	37	1,936 73	
	46	53 50	
	25	11 05	
	31	628 56	
	714	267 32	
	50	5,000	
	70	183 37	
	52	17,591 73	
	57	96 74	
	40	20 38	
	45	720 09	
	00	99 80	
	59	5,000	
	67	75	
	30	2,500	
	65	49 27	
	37	2,926 45	

* Figures marked with an asterisk (*) are written with lead pencil in the original.

17 *Watters' Exhibit No.* 10—(Continued).

Fidelity national bank, Cincinnati, O., in account with Chemical national bank.

Dr. March.			Cr.
	$101,051 20*	$2,369,603 86*	$2,414,362 26*
27	60 35		
74	1,677 75		
75	67 21		
61	5 80		
69	5,000		
01	1,020 27		
08	1,076 62		
68	5,000		
10	2,141 61		
79	10,000		
12	139 56		
49	7,500		
54	1,500		
71	5,000		
51	479 89		
48	50		
29	18 81		
44	53 30		
28	58 93		
98	1,000		
31	103 10		
800	2,500		
02	5,000		
659	25		
		150,504 49	
67	348 15		
739	180 52		
629	80		
804	59 84		
732	69 30		
		762 81	
25 Ret. unp'd		35	
0523	10		
1341	56		
538	7 73		
28	29 80		
10	50		
690	208 85		
55	1,510 91		
93	80 07		
57	47 87		
89	1,174 31		
63	1,640 40		
51	130 20		
54	541 42		
97	80 36		
91	1,493 51		
61	1,322 78		
76	1,350 52		
96	810 11		
28	80		
83	91 14		
52	1,879 15		
79	507 39		
45	184 41		
80	2,349 82		
87	921 69		
713	5 54		
16	54 56		
99	10,000		
73	3,000		
25	92		
21	500		
78	1 85		
47	36 70		
60	52 30		
38	286 10		
15	130 19		
46	39 79		
96	2		
36	9		
17	435		
76	49 80		
19	295		

* Figures marked with an asterisk (*) are written with lead pencil in the original.

18 *Watters' Exhibit No.* 10—(Continued).

Fidelity national bank, Cincinnati, Ohio, in account with Chemical national bank.

Dr. March.				Cr.
		$31,250 62*	$2,520,906 16*	$2,414,362 26*
	720	52 20		
	97	6,000		
	23	80		
	92	4,145 83		
	818	17,409 07		
	59	1,500		
	67	7,000		
	05	5 23		
	58	1,000		
	07	235 43		
	01	4,136 27		
	15	292 41		
	09	65 58		
	72	420 02		
			73,592 66	
	822	621 10		
	33	270		
	24	1,898 09		
	19	18 50		
	35	208 92		
	711	696 48		
			3,713 09	
26	Ret. pro		21 56	
	" "		21 56	
	" "		21 56	
	" "		21 56	
26	8687	100		
	83	100		
	79	100		
	11389	118 29		
	422	4 20		
	539	142 50		
	684	70 28		
	702	241 88		
	794	144 93		
	90	12,664 80		
	45	31 70		
	89	7,869 12		
	06	3,000		
	80	14,082 80		
	93	4,168 98		
	88	8,631 24		
	95	124		
	87	7,117 43		
	81	5,662 88		
	84	3,974 87		
	85	7,708 43		
	82	4,711 65		
	72	6,000		
	820	33 25		
	61	149 80		
	13	182 24		
	12	168 32		
	60	6,000		
	30	195 30		
	31	210 07		
	29	362 59		
	74	291 77		
	32	307 82		
	44	41 96		
	78	3,000		
	19	376 68		
	08	32 80		
	41	12 03		
	65	500		
	62	2,459 50		
	28	414 20		
	91	1,000		
	57	9		
	16	4		
	42	101 79		
	25	451 48		
	36	296 37		
	23	416 21		

* Figures marked with an asterisk (*) are written with lead pencil in the original.

19 *Watters' Exhibit No.* 10—(Continued).

Fidelity national bank, Cincinnati, Ohio, in account with Chemical national bank.

Dr. March.			Cr.
03	$15		$2,414,362 26*
43	57 29		
51	39 89		
50	140 50		
71	958 27		
45	94 13		
34	339 08		
69	11 70		
14	43 66		
52	144 63		
906	10,000		
		$115,691 31	
806	201 51		
791	6,083 74		
86	5,534 35		
442	100		
895	193		
		12,112 60	
28 Ret. pro		21 56	
" date		98 23	
" end		10	
		$2,726,231 85*	
26 Cert		10,000	
28 8627	100		
11322	1 20		
483	25		
90	581 90		
88	1,000		
89	1,000		
95	2,850		
686	762 99		
724	650		
33	100		
83	3,271 75		
18	244 06		
54	117 43		
80	1,024 34		
76	145 80		
97	329 75		
93	138 30		
68	67		
73	312 80		
90	356 57		
55	106 15		
10	31 90		
53	86 60		
27	985 30		
46	16 20		
70	389 36		
82	151 68		
98	6 05		
87	30		
86	25		
89	53 75		
48	139 97		
26	1,676 83		
63	87 20		
94	167 35		
907	22,000		
15	20,000		
22	5,000		
73	5,000		
09	3,000		
24	199 79		
59	1,000		
04	101 25		
02	43 39		
00	6,265 16		
1	203 06		
52	999 60		
12	1,500		
35	425 40		
13	7,000		

*Figures marked with an asterisk (*) are written with a lead pencil in the original.

20 *Watters' Exhibit No.* 10—(Continued).

Fidelity national bank, Cincinnati, Ohio, in account with Chemical national bank.

Dr. March.

		$89,769 88*	$2,736,231 85*					$2,414,362 26*
	905	2,246 28		22	Hazard	$1,010 25		
	45	8,000			Richmond	1,125 52		
	77	6,009			Davidson	3,903 92		
	16	3,000			Richmond	2,142 73		
	03	265 48						8,182 42
		270 51	109,281 64	22	Galbeath			286 59
		10 80			Winter's Nat.	10,000		
			281 31		22 M	95,962 22		
29*	144	100						105,962 22
	106	100		25	R. K. Carter			500
	271	84 40			Crook			7 70
	424	72 17			B. W. Hitchcock			200 75
	536	29 77			Winter's Nat.	30,000		
	636	10			23	59,152 83		
	38	50						89,152 83
	735	1 40		26	Error cr., 2-14, $\frac{94279}{94179}\frac{08}{08}$			100
	811	8 60			24	77,932 66		
	49	213 69			Mrc., Atlanta	20,000		
	99	144 56						97,932 66
	56	50			Van Worden			173 91
	71	2,200		28	26	76,046 92		
	39	125 37			25	94,403 95		
	31	75			Bk. Ohio Valley	5,000		
	17	203 19			1 Ashville	7,500		
	55	5,936 68						182,950 87
	914	5,000			Thatcher	1,194 30		
	42	84 21			"	1,999		
	32	128 52						3,193 30
	74	4,152 08			Carter			124 91
	19	318 45						2,902,830 33*
	38	171 74						
	50	999 60						
	21	70						
	26	500						
	37	182 17						
	11	5,000						
	43	33 81						
	41	96 89						
	10	1,000						
	34	50						
	40	120 13						
	36	287 80						
	27	500						
	53	72 30						
			28,172 53					
			2,873,907 33*					$2,902,830 33
			28,863 00		Balance March 28, 1887			$28,863

E. & O. E.

W. J. QUINLAN, Jr., *C. F.*

* Figures marked with an asterisk (*) are written with lead pencil in the original.

21 *Watters' Exhibit No. 10*—(Continued).

Fidelity national bank, Cincinnati, in account with Chemical national bank.

Dr. March.			Cr.	
29	Ret. pro.		$21 56	$28,863*
	892		10 80	
30	11577	192 35		
	722	100		
	885	7 58		
	39	25		
	84	53 14		
	47	337 20		
	920	5,000		
	96	632 73		
	18	5,000		
	58	2,000		
	92	6 36		
	69	5,000		
	86	520		
	65	3 75		
	54	27 55		
	48	12 83		
	80	58 25		
	25	10,011 21		
	98	500		
	94	7 87		
	70	19 02		
	44	942 19		
	67	2,500		
	93	5,000		
	020	25		
			37,982 03	
	881	1,149 98		
	972	1,000		
	57	1,000		
	60	1,500		
	023	15,000		
	526	30		
			19,679 98	
	519	100		
	709	265		
	344	25		
	478	106		
	613	50		
	762	68 40		
	864	131 54		
	40	75		
	962	20		
	88	5,000		
	97	474 50		
	78	397 64		
	87	5,000		
	68	20		
	64	33 33		
	51	10,000		
	91	7,000		
	95	329 27		
	09	37 49		
	19	1,000		
	43	7,505 57		
	01	456 67		
	03	55 16		
	30	1,000		
	65	16 05		
	28	3,540 21		
	07	2,520 46		
	06	101 50		
	00	8,749 26		
	10	172 96		
	18	4,373 78		
	05	244		
	14	5,715 29		
	08	1,640 54		
	02	2,442 64		
	04	781 91		
	31	1,000		
	39	3,000		
	40	350		
			73,799 17	

*Figures marked with an asterisk (*) are written with lead pencil in the original.

22 *Watters' Exhibit No.* 10—(Continued).

Fidelity national bank, Cincinnati, O., in account with Chemical national bank.

Dr. March.

			$131,493 54*				$28,863*
31	Cash		69 00	29	Error, M'ch 4, '82, footing dr. cash		10
			15		N. Y. Life Ins		9 45
	83		52 82	29	Wenham		14 75
	10891	100		29	Potter		118 24
	11581	60			Richmond		673 45
	756	5		30			96,686 97
	58	187 86			Finlong		63 20
	75	9		31	Jesselson & Co		100
	963	1,200			Greensborough, Md.	841 31	
	85	42				66,023 19	
	61	35					66,864 50
	83	296 71		31	Richmond		2,089 90
	89	10,000					195,413 50*
	99	161 05			April 1, '87. Balance		32,675 97
	46	57 10					
	47	30 05					
	90	45					
	2059	129 28					
	41	10,000					
	62	15 42					
	26	10 65					
	29	169 04					
	66	77 50					
	15	96 75					
	42	8,000					
	91	27,342 13					
	33	35 57					
	44	10,000					
	89	115 93					
	51	8					
	68	74 62					
	67	136					
	58	341 20					
	13	500					
	60	265					
	79	1,000					
	38	5,000					
	27	92 30					
	36	10,000					
	46	16 86					
	55	769 01					
	69	3 80					
	47	31 25					
	37	10,000					
			96,450 08				
			228,089 53				$228,089 53
	April 1, '87. Balance		32,675 97				

E. & O. E.

W. J. QUINLAN, JR., *Cash'r.*
FINCH.

* Figures marked with an asterisk (*) are written with lead pencil in the original.

23 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of "Watters' Exhibit No. 10" in the case of David Armstrong, receiver of the Fidelity National Bank of Cincinnati, Ohio, *vs.* The Chemical National Bank of New York, No. 473, October term, 189–, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

Seal United States Circuit Court of Appeals, Sixth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the sixth circuit, at the city of Cincinnati, Ohio, this 14 October, 1898.

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

24 Supreme Court of the United States, October Term, 1898.

DAVID ARMSTRONG, Receiver of the Fidelity National Bank of Cincinnati, Ohio, Appellant,
vs.
THE CHEMICAL NATIONAL BANK OF NEW York, Appellee.

No. 279. (General Docket, No. 16849.)

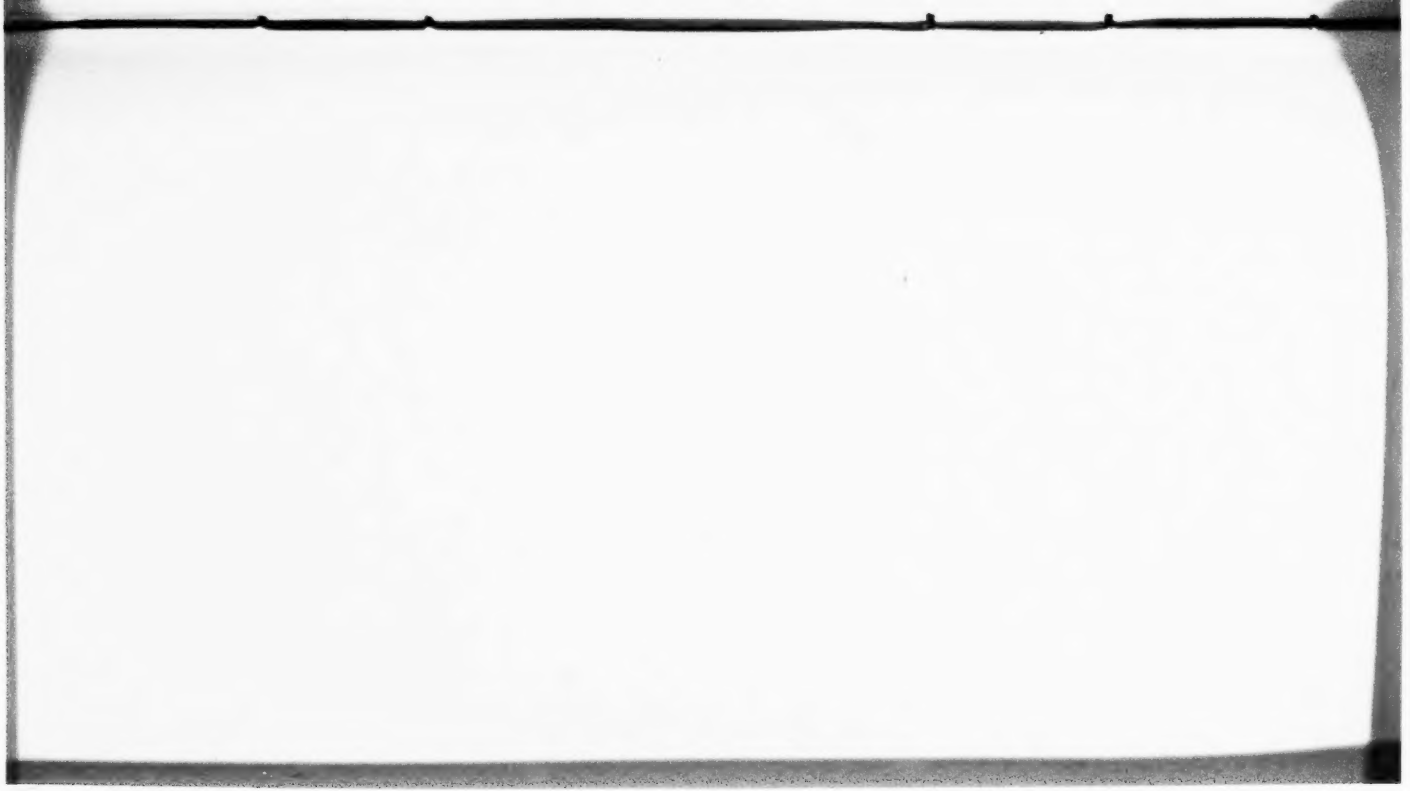
Stipulation.

It appearing that by inadvertence the clerk of the United States circuit court of appeals for the sixth circuit in certifying the transcript of the record in this cause has failed to include therein a copy of the exhibit offered by the appellee and styled "Watters' Exhibit No. 10," which was a part of said record, as will appear from page 116 of the transcript as certified by said clerk (page 101 of said record as printed by the clerk of the Supreme Court), it is now agreed that the clerk of said circuit court of appeals shall transmit to the clerk of the Supreme Court a certified copy of said exhibit, together with this stipulation, and that the same shall be filed, made, and considered a part of the record in this cause as fully as if said exhibit had been contained in the transcript of said record first certified by said clerk of the court of appeals, proceedings in the nature of suggestion of diminution of record being waived.

Cincinnati, Oct. 13th, 1898.

JOHN W. HERRON,
F. F. OLDHAM,
Solicitors and Counsel for Appellant.
WM. WORTHINGTON,
Solicitor and of Counsel for Appellee.

25 [Endorsed :] Case No. 16,849. Supreme Court U. S., October term, 1898. Term No., 279. David Armstrong, rec'r, &c., app't, *vs.* The Chemical National Bank of New York. Stipulation & addition to record. Filed Oct. 17, 1898.



No. 279. 58

Motion to advance.

Filed Apr. 1, 1899.

JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 279.

DAVID ARMSTRONG, RECEIVER OF THE FIDELITY NATIONAL BANK OF CINCINNATI, OHIO, APPELLANT,

vs.

THE CHEMICAL NATIONAL BANK OF NEW YORK, APPELLEE.

MOTION TO ADVANCE CAUSE FOR HEARING.

Now come the counsel for the appellant and the appellee and move the court that this cause be taken up for hearing out of its order upon the docket and be set down for oral argument at an early day for the following reasons:

Many of the questions involved in this case are also involved in case No. 206 upon the docket of this court of this

term entitled H. F. Auten, as receiver of the First National Bank of Little Rock, Arkansas, plaintiff in error, *vs.* United States National Bank, defendant in error, which was argued and submitted on the 9th day of March, 1899. The court is now familiar with the facts in that case, so we do not attempt to state them.

For the facts in the case at bar the court is respectfully referred to the statement prefixed to the opinion of the court below (Record, pp. 283–295) and to the briefs of counsel, which are on file. They are too voluminous to be stated in this motion; but the following summary is deemed sufficient to show the resemblance between the cases:

In the case at bar the appellee, being the New York correspondent of the Fidelity National Bank of Cincinnati, Ohio, upon the application of the vice-president of the latter bank gave it a credit by way of loan upon the books of the appellee in the sum of $300,000 early in March, 1887. No express authority was given by the board of directors of the Fidelity bank for the making of this loan nor did the books of that bank contain any reference thereto. Upon the same day that the loan was credited in New York the clerks of the Fidelity bank in Cincinnati, by direction of its vice-president, credited him and charged the appellee with the sum of $300,000. Of this the appellee had no notice. The checks regularly drawn by the Fidelity bank upon the appellee during the month of March, 1887, and paid by the appellee exceeded in amount the sum credited by the appellee to the Fidelity bank, as above mentioned, with all other credits to that bank with the appellee. Early in April, 1887, the appellee rendered to the Fidelity bank a monthly account current showing this loan, and no objection was ever made to this account upon this ground. The appellee, having presented a claim upon this loan and the same having been rejected, filed its bill in equity to establish its claim. In addition to the matters above mentioned, evidence was offered which

the appellee claims tended to show that by custom among bankers the officers of banks are presumed to have authority to borrow money in behalf of their banks; that the directors of the Fidelity national bank had entrusted the management of that bank to its vice-president, and thereby authorized him to make the loan, and that the loan had been ratified by the Fidelity national bank before its insolvency was declared and by its receiver and stockholders thereafter.

In each case counsel have discussed the questions as to how far borrowing is incidental to banking; as to the authority of national banks to borrow money; as to the method in which this is done and the scope of the apparent authority of the officers of the bank in that connection; as to what circumstances justify a lending bank in presuming that the loan was properly authorized by the borrowing bank; as to what constitutes ratification, and as to what state of facts will make the borrowing bank liable as having enjoyed the benefit of the transaction.

The briefs in No. 279 have been filed, and the case is ready for argument, on three days' notice, at any time that may be assigned by the court. Counsel for the parties hereto respectfully suggest that they desire to present their views upon these questions while No. 206 is under consideration and before the court has reached a conclusion thereon, and believe they can be of assistance to the court in reaching a correct conclusion upon the questions which are common to the two cases. While several questions are thus common, there are other matters involved in No. 279 which are not involved in No. 206. For this reason counsel in No. 279 had not thought they would properly protect the interests of their clients by suggesting that the two cases be heard together as one. They had anticipated that No. 279 would probably be reached in its regular order before a conclusion was reached upon No. 206; but the approaching end of the term warns them that this anticipation may not

be realized. Therefore they now respectfully urge the court to assign an early day for the hearing of No. 279.

JOHN W. HERRON,
F. F. OLDHAM,
Counsel for Appellant.

WM. WORTHINGTON,
Of Counsel for Appellee.

This motion may be submitted at any time without further notice.

CINCINNATI, OHIO, *March* 20, 1899.

JOHN W. HERRON,
F. F. OLDHAM,
Counsel for Appellant.

WM. WORTHINGTON,
Of Counsel for Appellee.

No. 279.

MAR 1 1899
JAMES H. McKENNEY,
Clerk.

Brf. of Herron & Oldham for Appt

SUPREME COURT OF THE UNITED STATES.

Filed Mar. 1, 1899.

OCTOBER TERM, 1898.

DAVID ARMSTRONG, Receiver of The Fidelity National Bank of Cincinnati, Ohio,
Appellant,
vs.
THE CHEMICAL NATIONAL BANK of New York.

No. 279.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR APPELLANT.

JOHN W. HERRON,
FRANCIS F. OLDHAM,
Counsel.

W. H. ANDERSON & CO., Law Publishers, Cincinnati, Ohio.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

DAVID ARMSTRONG, Receiver of The Fidelity National Bank of Cincinnati, Ohio,
Appellant,
vs.
THE CHEMICAL NATIONAL BANK of New York.

No. 279.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR APPELLANT.

JOHN W. HERRON,
FRANCIS F. OLDHAM,
Counsel.

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SUPREME COURT OF THE UNITED STATES.

DAVID ARMSTRONG, Receiver of The Fidelity National Bank, of Cincinnati, Ohio,
Appellant,
vs.
THE CHEMICAL NATIONAL BANK, OF NEW YORK.

No. 279.

Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

STATEMENT OF THE CASE.

On the 10th day of May, 1890, The Chemical National Bank of New York, filed its bill in equity in the Circuit Court of the United States for the Southern District of Ohio, Western Division, against the appellant, David Armstrong, Receiver of the Fidelity National Bank, of Cincinnati, to compel the allowance of a claim for $300,000 for money alleged to have been loaned by appellee to the Fidelity National Bank on the 2nd day of March, 1887. The bill alleges that the Fidelity National Bank, at the time of the loan, delivered to appellee, as collateral security, certain promissory notes

of the aggregate face value of $326.695.30, some of which were afterwards surrendered and other notes substituted therefor. A list of the notes so held by appellee after the substitution is set forth in a schedule attached to the bill, marked "Exhibit A." The bill admits that the sum of $75,000 in the aggregate had been realized by the appellee on the collaterals, which amount appellee claims to hold in lieu of the notes so paid. The prayer is, that the amount due upon the loan may be ascertained; that appellee may be decreed to be a creditor of said Fidelity National Bank in the sum so found due, and entitled to receive dividends with interest thereon from the time that dividends were paid to other creditors of said bank by the Receiver, until the dividends to be received by appellee with the proceeds of collaterals realized shall fully pay the amount of its claim. The answer of appellant, as amended, denies that the loan was made to the Fidelity National Bank, but alleges that Edward L. Harper, vice-president of the Fidelity National Bank, borrowed the money without authority from the bank, and used the same individually. The answer further alleges, as a partial defense, that, by the negligence of appellee, an indorser upon one of the notes for the sum of $25,000, received as collateral security by appellee, was discharged, and that the sum of $75,000 realized upon the collaterals had been credited by appellee on its claim. The answer claims that, if appellant is liable at all, the amount lost by the negligence of appellee and the amount realized by it on the collaterals should be first credited on the claim; also that appellee should be required first to exhaust the collaterals still held by it, and apply the proceeds on its claim, and be permitted to prove its claim only for the balance thereafter remaining due.

To the answer the complainant filed a general replication. Upon trial in the Circuit Court, it was held that the claim

was a valid claim, but the Court deducted all collections made upon collaterals prior to the filing of the claim, and rendered judgment for the balance.—(50 Fed. 798.)

Both parties appealed from this decision. On hearing before the Circuit Court of Appeals, that Court reversed the decision of the Circuit Court, and not only held the claim to be a valid one, but held that it should have been allowed for the full amount, regardless of proceeds realized from the collaterals.—(59 Fed. 372.)

On a petition for rehearing, the Circuit Court of Appeals modified this decision and reversed the cause, and remanded it to the Circuit Court, with instructions to permit either party to take additional testimony upon the issue, whether the Fidelity Bank owes anything to the Chemical Bank, by virtue of the alleged loan. That if the issue be decided in favor of the Receiver, the bill should be dismissed, and a decree entered in favor of the Receiver for the restitution of the $100,000 paid by the Receiver July 25, 1892, to the Chemical National Bank on the faith of the decree below. That if the liability of the Fidelity National Bank should be established, a decree to be entered directing the Receiver to allow the claim of $305,450 (being the amount of the loan and interest until the date of the insolvency, June 21, 1887), and to pay the dividends accruing on said claim, with interest, on those declared before April 25, 1890, from that date, and on those thereafter declared from the date of declaration, etc., etc. (65 Fed. 573.) The cause was again tried upon additional evidence in the Circuit Court, which decided the issue upon the liability of the Fidelity National Bank against the Receiver, and judgment was there entered in accordance with the mandate of the Circuit Court of Appeals. (Rec., p. 266 and 76 Fed. 339.) From this decree the Receiver again appealed to the Circuit Court of Appeals, which affirmed the

decree of the Circuit Court with costs. (Rec., p. 283 and 83 Fed. 556.) The Receiver of the Fidelity National Bank filed his petition for appeal from that decree to this Court (Rec., p. 307), and the appeal was allowed by the Circuit Court of Appeals. (Rec., p. 309.)

The facts appearing by the evidence, and practically undisputed, are as follows:

On February 28, 1887, E. L. Harper, the Vice-President of the Fidelity National Bank, enclosed to the Cashier of the Chemical National Bank, of New York, the Fidelity's certificate of deposit for $300,000, payable to the order of E. L. Harper, and also a large amount of bills receivable as collateral to the certificate, and requested the Chemical to place the amount to "our" credit and advise the rate. Copies of this letter and of the certificate of deposit, and a list of the collaterals sent with it, appear on pp. 17-19 of the printed record. The answer of the Chemical, dated March 2, 1887 (Rec., p. 29), advises the Fidelity of the receipt of letter of February 28, and that the Chemical had credited the Fidelity $300,000.

The letter of E. L. Harper of February 28, 1887, was not copied into the letter-book of the bank (Rec., p. 65, Q. 32, 33), and there is no evidence that any other officer of the bank knew of its existence. At the time E. L. Harper did not have $300,000 to his credit in the bank, and he had not deposited that sum, or any part of it, as the basis of such a certificate. The certificate itself did not appear on the books of the bank. It was not written on a blank certificate of deposit, taken from the usual place in the book of certificates, either as to date or number, but it was torn out of the back of the book (Rec., p. 63, Q. 9, and p. 98) and filled in by Miss Holmes, the acting exchange clerk of the bank. What knowledge either she or the cashier had of the object of this

certificate we do not know. Miss Holmes has disappeared, and the cashier is dead, so that we have no statement from either of them as to the circumstances attending the issuing of this certificate. It was probably done by order of Harper, without any other knowledge in regard to it. The Chemical, on March 2, 1887, placed to the credit of the Fidelity $300,000, and on the same day notified it of this credit. On the same day, by direction of E. L. Harper, entries were made on the books of the Fidelity charging this sum to the Chemical, and crediting the amount to Harper. Mr. J. H. Watters' on pages 63-65 of the printed record, explains how this was done, and gives the original tickets handed in at the time. They are Watters' Exhibits 2 and 3. (Rec., p. 98). His statement is as follows:

"Mr. Edward L. Harper, the Vice President of the Fidelity National Bank, came to my desk—the general bookkeeper's desk — and gave me a charge ticket, asking me to place it to his credit.

(Copy of charge ticket.)

CINCINNATI, 1887.

THE FIDELITY NATIONAL BANK.

Credit Check.

Transfer of funds $300,000

E. L. H.

Charge Chemical N. Y.

I think I made out the charge deposit ticket, which was given to the receiving teller, who in turn entered it on the desposit book of the Fidelity, and by the individual bookkeeper placed to the credit of Edward L. Harper. The charge ticket went to the general bookkeeper, who in turn charged a like amount to the Chemical National Bank.

This is the original deposit ticket made out by myself at the request of Mr. Edward L. Harper.

THE FIDELITY NATIONAL BANK

When city checks are desposited, name the bank on which they are drawn. When foreign checks or drafts, name the State on which they are drawn.

CINCINNATI, March 2. 1887.

Credit account of E. L. Harper . .
Currency . . . . . .
Coin . . . . . .
Checks . . . . $300,000."

This $300,000 was used by Harper for his individual purposes (Rec., p. 73, Q. 106).

There is no evidence that any officer or director of the bank knew of this alleged loan, either at the time or subsequently. There is no reference to it on the minutes of the Board of Directors. Soon after April 1, 1887, the Chemical Bank sent to the Fidelity an account current for the month of March. In that account the Fidelity is credited with March 2, 1887, Tem. loan * * * 300,000 (Rec., p. 67, Q. 48. and Watters' Exhibit No. 10, filed by stipulation of Counsel Oct. 13, 1898) This paper was filed away among the papers of the Fidelity National Bank (Rec., p. 68, Q. 49) and there is no evidence that it was ever seen by any director of the bank except Harper.

Upon the last trial of the case in the Circuit Court, testimony was taken tending to show the custom of banks in borrowing without authority from the Board of Directors, the transmission of reconcilement sheets between the Chemical and Fidelity banks after the transaction of March 2, 1887,

and a general authority claimed by appellee to have been vested in Harper by the method, or want of method, in the management of the Fidelity's affairs by its Board of Directors. There is but slight conflict in the evidence, and its legal effect will be considered in the argument.

SPECIFICATION OF ERRORS.

The errors assigned are, first, that the Circuit Court and Circuit Court of Appeals erred in finding that The Fidelity National Bank of Cincinnati, Ohio, was liable to the Chemical National Bank of New York, for the $300,000, or any part thereof, claimed to have been loaned by The Chemical National Bank on the 2nd day of March, 1887.

Second, that the said courts erred in finding that collections, made from collaterals securing said alleged loan by the Chemical National Bank, prior to the declaration of dividends by the Receiver of the Fidelity National Bank, should not be deducted from the amount of such loan in determining the sum upon which dividends should be paid to the Chemical National Bank.

Third, that said courts erred in not requiring the Chemical National Bank first to exhaust its collateral security and apply the proceeds on its claim before proving it against the Receiver for dividends.

Fourth, that said courts erred in not charging the Chemical National Bank with, and deducting from its claim, the sum of $25,000, which it negligently failed to collect upon the note indorsed by John V. Lewis, and held by said bank as part of its collateral security.

Fifth, that said courts erred in finding that the Chemical National Bank should be paid interest on the several dividends

declared in favor of the creditors of the Fidelity National Bank, from April 25th, 1890, on those declared prior to that date, and from the date of declaration of the dividend on those subsequently declared.

ARGUMENT.

I

The first question presented is, whether the Chemical National Bank loaned $300,000 to the Fidelity National Bank.

We respectfully maintain that the Chemical had no right to loan that sum to The Fidelity on the application of its Vice-President unauthorized by the Board of Directors to borrow; that having undertaken to loan to an agent unauthorized to borrow, the loan was in legal effect to the agent personally, and that the Fidelity is not liable, as it neither received the money nor ratified in any way the transaction.

According to the testimony of Mr. Quinlan, Cashier of the Chemical, the transaction in question was made at the request of Mr. Harper, Vice-President of the Fidelity, in the letter of February 28, 1887, in which he says:

"Enclosed herewith we hand you for credit our certificate of deposit, No. 345, for $300,000, with bills collateral, as follows: * * * We desire to keep a large reserve with you, and we trust you will make the rate as low as you proposed some time since.

"Please place the amount to our credit and advise the rate.

"Respectfully yours,
"E. L. HARPER,
"Vice-President."
(Rec., pp. 17, 18.)

Mr. Quinlan, in his answer to this, says:

"Your favor of the 28th has been received. We credit Fidelity National Bank $300,000, and shall be considerate as to rate when the loan is paid. I presume that you are aware of the very material change of rates within the past two or three days. Loans for sixty and ninety days on stock exchange collaterals (railroad stocks and bonds), which were ruling at 4½ percent last week are now 5½ and 6 percent. I mention this to show you the present condition of the money market." (Rec., p. 29.)

Mr. Quinlan, in answer to the X-Q 160, (Rec., p. 38), says, in reference to certificates of deposit like that sent to the Chemical by Harper:

"I have run over several which we have from the banks, and they are made out in various ways; sometimes made by so and so namely, one of the officers of the bank, but not describing him as an officer, payable to the order of the Chemical National Bank; sometimes they state the Chemical National Bank has deposited so much to the order of W. J. Quinlan, Jr., Cashier; but when these certificates of deposit come, we don't criticise them closely. We virtually care nothing about it; we know their object; their object is, as I have already stated, to borrow money; but not to make it appear on the books as a loan, having the double object in view, to swell their deposits, and not to have to report a loan, and hence we don't criticise the phraseology of the certificates."

And he describes how this transaction was entered on the Chemical books, (Rec., p. 34.)

"Loan No. 1070, March 2, 1887, Fidelity National of Cincinnati $300,000. Certificate of Deposit Fidelity National Bank $300,000. Receivable $326,695.30."

In other places Mr. Quinlan speaks of this being a customary way for banks to borrow money.

Mr. Williams, the President of the Chemical, testifies, (Rec., p. 45, Q. 5.): "Mr. Quinlan and I talked it over, and finally agreed to make the loan." On page 46, Q. 21, he says, "My impression is that he (Harper) had written about a loan at a low rate of interest," and on page 48, Q. 51, "I regarded it (the certificate of deposit) as a loan in the place of a note."

This testimony shows conclusively that the transaction was not a purchase or discount of a certificate of deposit. The certificate of deposit (Rec., p. 19) was in the following form:

CINCINNATI, February 28, 1887.

E. L. Harper has deposited in this bank three hundred thousand dollars ($300,000) payable to the order of himself on return of this certificate in current funds.

AMMI BALDWIN, Cashier.

$300,000. Indorsed, "E. L. Harper."

The loan was to bear interest. The certificate bore no interest. The Chemical knew, as admitted by its President and its Cashier, that E. L. Harper had *not* deposited $300,000 in the Fidelity. He represented the Fidelity as wanting to borrow that amount, not as having it, and no one was misled by this customary and well understood misrepresentation of the Cashier. The proof of claim and petition in this case is based upon a loan of money by one bank to another.

While a temporary loan, or a loan on call, it was expected to continue for sometime. The rate of interest was discussed in the correspondence as a material item in the transaction. Mr. Harper, in his letter, "trusts that you will make the rate as low as you proposed some time since." This shows that the subject of a loan had been the subject of previous correspondence or verbal negotiation. Mr. Quinlan says in

reply, "we shall be considerate as to the rate of interest when the loan is paid," but adds that there has been a material change of rates within a few days; that the rates on sixty and ninety day loans on stock collaterals have gone up from 4½ to 5½ or 6 percent. He gives no quotations on temporary or call loans. The collaterals originally sent did not mature until sixty days to four months from that date, and as each piece approached maturity, it was returned to the Fidelity, and replaced by other paper not maturing so soon. The loan did continue without any effort to collect it from March 2 to June 20, 1887, and so far as appears, would have continued much longer, if the Fidelity had not failed. On May 21, Mr. Harper wrote that he would pay the loan July 15, if that were agreeable to the Chemical, and would at once pay the interest up to that date, and so far as appears this arrangement was concurred in by the Chemical. It was, therefore, clearly a loan which was expected on both sides to run for some time.

What then is the law governing the question as to the validity of a loan made to the officers of a national bank without the authority of the board of directors?

A recent case decided by this Honorable Court is full and conclusive on the subject.

Western National Bank of New York vs. Armstrong, 152 U. S. 346.

The facts in that case are substantially similar to those in the present case and are briefly as follows. By letter of date May 16th, 1887, signed by E. L. Harper without any official designation, he requested the New York bank to make a loan of $200,000 and to place the amount to the credit of the Fidelity Bank. Four notes, made by one A. P. Gahr to E. L. Harper and indor ed by him, together with certificates for

1600 shares of the capital stock of the Fidelity Bank, were inclosed in the letter. The $200,000 was placed to the credit of the Fidelity on the books of the New York bank and was drawn out partly by Hopkins the assistant cashier, and partly by Harper himself, by drafts in the name of the Fidelity Bank but did not in fact come into the actual use and possession of the Fidelity Bank otherwise than by being deposited to its credit in the New York Bank and by being checked out by drafts signed by the proper officers in the same manner as other deposits are usually drawn out. It was claimed on the part of the New York Bank that the loan was in fact, as their officers understood it to be, a loan to the Fidelity and suit was brought in equity against Armstrong, Receiver, on that theory. For the Fidelity it was claimed that the loan was to E. L. Harper personally, and that the transaction was a discount of the Gahr notes.

Mr. Justice Shiras, pronouncing the opinion of the court, says:

"There are other features of the correspondence that are pointed to by the parties as making for their respective contentions. It may be conceded that the New York Bank acted upon the theory that the loan was to the Ohio bank, and took the notes and certificates of stock as collateral. But the liability of the Ohio bank is not a necessary consequence of such a concession. It has further to be shown that the Ohio bank was really a party to the transaction, either by having authorized Harper to effect the loan on its behalf, or by having ratified his action, and having accepted and enjoyed the proceeds of the discount."

"There is no evidence whatever that the Board of Directors of the Fidelity National Bank gave any authority to Harper to borrow money on behalf of the bank, much less to borrow so enormous a sum for so long a time."

"The most that can be claimed in this case, is that Harper acted as the principal executive officer of the bank. It

can not be pretended that as such he had power without authority from the Board to bind the bank by borrowing $200,000 at four months time."

"It might even be questioned if such a transaction would be within the power of the Board of Directors."

"Nor do we doubt that a bank in certain circumstances may become a temporary borrower of money. Yet such transaction would be so much out of the course of ordinary and legitimate banking, as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money. Even, therefore, if it be conceded that it was within the power of the Board of Directors of the Fidelity National Bank to borrow $200,000 on time, it is yet obvious that the Vice-President, however general his powers, could not exercise such a power unless specifically authorized so to do, and it is equally obvious that persons dealing with the bank are presumed to know the extent of the general powers of the officers."

"Without pursuing this part of the subject further, we think it evident that Harper had no authority to borrow the money, and that the bank can not be held for his engagements, even if made in behalf of the bank, unless ratification on the part of the bank be shown. It is scarcely necessary to say that a ratification to be efficacious, must be made by a party who had power to do the act in the first place; that is in the present case, the Board of Directors; and that it must be made with knowledge of the material facts. There is not the slightest evidence shown in this record, that the Board of the Fidelity National Bank, by any act formal or informal, undertook to ratify Harper's action in the premises, or that they ever had any knowledge of the transaction."

Can this case be distinguished from the one at bar? Not, we respectfully submit, so far as the right of E. L. Harper to bind the Fidelity without the action of its Board of Directors is involved. It is true that in the case now before the Court, Harper *assumed* to borrow on behalf of the bank. But in the case cited the Court waive the issue upon that point as

immaterial, and without deciding whether the form of the loan was that of a loan to Harper or a loan to the bank, assume for the purposes of the argument that Harper intended to borrow for the Fidelity and that the New York Bank intended to loan to the Fidelity. The whole reasoning of the Court is applicable to that hypothesis only. If the Court had found that by the terms of the contract as shown by the correspondence the loan was to Harper personally, there would have remained nothing to reason about. The conclusion of the Court is clear and distinct (italics ours) "we think it evident that Harper had no authority to borrow the money, and that the bank cannot be held for his engagements, *even if made in behalf of the bank*, unless ratification on the part of the bank be shown."

In both cases, Harper was vice-president of the bank. In neither case was there any action of the board of directors. Independently of ratification, he had the same authority in one case as in the other.

Nor does the form by which the loan was obtained constitute any legal difference in the cases. The law would do a vain thing in protecting banks against the unauthorized acts of their officers, if the officers by adopting any form, *thoroughly understood by the lender as a form*, can accomplish their unlawful purposes. Cashier Baldwin, who signed the certificate of deposit enclosed by Harper when he borrowed the $300,000, had no more authority to borrow than Harper had. The acts of both had no more validity than the acts of either alone; and as the President of The Chemical Bank (Rec., p. 45, Q. 5) and the Cashier (Rec., p. 38, X Q. 160) both knew exactly what the certificate of deposit meant, it has no legal significance in this case.

The differences in fact claimed to exist between the present case, and that of the Western National, are:

1. In the case of the Western National, the loan in question was the initial transaction between the two banks. In the present case there had been previous transactions between them. As none of these previous transactions were loans of money, we can not see how other transactions which were perfectly proper can legalize an illegal one.

2. In the case of the Western National Bank, the request for a loan by the Fidelity was not made by Harper signing his name as an officer of the bank. That is true, but the whole letter from Harper referred to the business of the bank, and the acceptance was directed to him as Vice-President. It was argued by the counsel for plaintiff that the whole correspondence and testimony proved that it was a loan to the bank. The Circuit Court did not hold that Harper did not apply for a loan for the bank, or that the answer did not propose a loan to the bank. It held that the transaction was a discount of paper not endorsed by the Fidelity, and that, therefore, it was not liable, and the decision of this court takes it for granted that Harper professed to be acting for the Fidelity, and that the Western understood him to be so acting.

3. It is claimed that in one case, it was a time loan, and in the other, a loan on call. The loan in the present case was as much a time loan as the other. Both were substantially time loans. That fact, however, makes no difference in fixing the illegality of the transaction.

4. It is claimed that there was a written obligation of the bank in one case, and not in the other. No written obligation is necessary in borrowing money. In the case of the Western, it was claimed that the loan was effected by correspondence; in the present case by correspondence, and the certificate of deposit accompanying the request for a loan.

The law governing this case seems so clearly defined by this Court, that it seems useless to take further time in citing cases to sustain it, and we submit that the facts in this record bring the present case clearly and unequivocally within the principles thus settled. This was a loan of $300,000, a larger sum than is pronounced by that opinion as "enormous," and as "beyond the authority of any officer of the bank to borrow." While termed a loan on call, it was a time loan in all its characteristics.

Being such, it was beyond the authority, if not of the Board of Directors, at least of any officer of the bank without the special authority of the Board of Directors to make. Harper had no such authority. Aside from the point that it is incumbent on the other side to prove such authority affirmatively, and that there is not a shadow of such proof, all the facts contradict the existence of such authority. The secrecy with which the thing was done is wholly inconsistent with such authority. The letter enclosing the certificate, and the one subsequently sending new collaterals, were not copied in the letter book of the bank. The collaterals, so far as they belonged to the bank, were forwarded without any entry of the fact being made on any book of the bank. The certificate of deposit was not entered on the books. The stub of the certificate of the number so sent—345—was marked cancelled, so that no such certificate would have appeared to have been issued by any one examining the books. The funds were immediately transferred to Harper, so as to give the matter the appearance of his private transaction. These and other facts of like character are wholly inconsistent with the idea that the Directors had any knowledge of the fact, or in any way authorized it. (Rec., p. 65, QQ. 25, 31, 32; p. 66, QQ. 37, 38, 39.)

There is another fact connected with the case showing

that the transaction was not in the regular course of banking business. The whole transaction was based on the certificate of deposit No. 345. This certificate was that E. L. Harper had deposited three hundred thousand dollars in the Fidelity National Bank, payable on demand to the order of himself on the return of that certificate. This was not true. He had deposited no money of the bank as a basis of the certificate. It was a fraud upon the bank to have issued it. It was not in the course of regular banking business. And this must have been known to the officers of the plaintiff bank. They did not believe that E. L. Harper had made any such deposit; or that said certificate stated the truth. Neither the President, nor the Cashier, in his testimony, claims that he believed it stated the truth; but claimed that other banks had done the same thing for the purpose of borrowing money. The President (Rec., p. 46, Q. 22) testified that he supposed the certificate belonged to the bank. If properly issued, it could only have belonged to the bank by being paid, and if paid it was of no use to any one else. He further says that he supposed it represented a loan. It seems a waste of words to argue that no such presumption was possible from the papers. The Cashier's testimony, on pages 38 and 39 is equally unsatisfactory. If the officers of the bank knew that this certificate stated an untruth, and that it was so issued merely for the purpose of borrowing money, it must be charged with notice of the subsequent use of the money obtained by the use of this paper.

It is claimed on behalf of the Chemical National Bank that the testimony does not show affirmatively that Harper had not, on deposit to his credit in the Fidelity, $300,000, at the date of the certificate, and the court is asked to presume that the certificate was what it purported to be. In the face of the testimony above cited, such a presumption would be a

violent one. As the officers of the Chemical knew that the Cashier issued that certificate merely for the purpose of borrowing money, to presume that the $300,000 was in the bank would be a more violent presumption in favor of the Cashier's authority than to presume action by the board of directors. Such presumptions are not indulged in favor of acts beyond the apparent scope of authority of the officers.

In Farmers and Merchants National Bank vs. Smith, 23 C. C. A. 80, the Circuit Court of Appeals in the Eighth Circuit held that a bank is not liable where its cashier sold a note and mortgage as a broker, and guaranteed payment as cashier. Judge Thayer says, p. 86, "But when the transaction, in which the bank is for the time being engaged, is known to the person dealing with it to be outside the legitimate sphere of its operations, no reason is perceived why a person, dealing with the cashier under such circumstances, should be allowed to indulge in any presumptions as to the cashier's authority. He is advised that, by the very nature of the transaction, all acts done and performed in relation thereto are beyond the power of the corporation, and, if he expects to hold the corporation liable on any contract or obligation entered into by the cashier, or other officers, in the course of that transaction, he should at least see to it that such contract or obligation is approved by the board of directors or other governing body."

We think, therefore, it is perfectly clear that this loan is invalid as to the Fidelity National Bank, unless it has been legally ratified, or there are such facts as will amount to a legal ratification.

The learned judge who pronounced the opinion in this cause in the Circuit Court of Appeals, held that sufficient authority was conferred upon Harper by the custom of banks

generally, in Cincinnati and New York, to permit their executive officers to borrow money on behalf of their banks, and that such custom was proven by the testimony. Also, that the conduct of the directors of the Fidelity Bank, in neglecting their business and practically permitting Harper to manage its affairs conferred upon him sufficient authority to borrow the $300,000.

We respectfully submit in the first place that the testimony does not show that any such general custom existed.

First, of the Cincinnati bankers,—

M. M. White, of the Fourth National states that he knows what is the custom of his bank,—they did not require a resolution of the board of directors of the borrowing bank to authorize the executive officer to borrow money. He, however, testifies that only on one occasion did he borrow money for his bank, and then a record of it was made in the proceedings of the Directors' meetings. (Rec., p. 145, Q. 10.) He says vice-presidents are not usually active in the management of the bank. (Rec., p. 145, Q. 12.)

Mr. Goodman says, "If they (another bank) had required a loan on their own account, we would have required a resolution of the Board of Directors." (Rec., p. 161, Q. 11.)

W. S. Rowe, of the First National, testifies that it was not customary to require a resolution of the Board of Directors, but they took the note of the bank, with municipal bonds or other good bonds as collateral. (Rec., p. 162, Q. 10.)

H. C. Yergason, of the Merchants National, testifies that they discounted bills receivable of other banks, but did not require a resolution of the board of directors of the borrowing bank. When his bank borrowed money, he always consulted the Board of Directors and obtained their approval. (Rec., p. 169, Q. 7.)

Mr. G. P. Griffith, of the Citizens, says it was customary

to make loans when requested by the officers of the bank; but "the institutions with which he was connected have never made a loan to a bank except when secured by securities such as county bonds, U. S. bonds or other good and sufficient securities." They never borrowed of other banks, though they have put up their government bonds and drawn against them. (Rec., p. 171, X Q. 2.)

J. D. Hearne, of the Third National, testifies that it was not customary, before the decision of the Supreme Court, to require a resolution of the board of directors of the borrowing bank before lending it money. Such loans were made by discounting the commercial paper of the borrowing bank, or direct loans; and, in the latter case, they would generally put up their bills receivable or other collateral to secure the loan. Mr. Hearne had borrowed money for his bank, and says, "we consulted with the Board of Directors when we borrowed money for the bank." (Rec., p. 175, X QQ. 2–6.)

This is all the testimony offered as to the custom in Cincinnati. We submit that it wholly fails to sustain such a custom here. There are six witnesses; three of them—White, Yergason and Hearne—had borrowed money for their respective banks. They swear that they always consulted the Board of Directors before doing so. Goodman testifies that he would not loan money to a bank, before the decision, without a resolution of the Board of Directors. The other two, Rowe and Griffith, speak of the custom and powers of the officers, but neither ever borrowed money for his bank. All testify that when such loans are made, they are made upon collaterals—upon government or other bonds, or the commercial paper of the borrowing bank. No better evidence of the doubt of these gentlemen as to the right of the banks to borrow money could be adduced. When these witnesses represented borrowing banks, they required the

authority of the board of directors; when they represented the loaning banks, they required collateral from which the debt could be realized without calling upon the responsibility of the bank itself. If the custom in Cincinnati is to prevail, as we submit is the case, the testimony offered sustains the opinion of the Supreme Court. It certainly does not show that it has been the custom for bank officers to borrow money without consulting the Board of Directors. Of all the witnesses examined, the two who are specially autocrats in their respective banks,—certainly as much so as Mr. Harper was in the Fidelity,—Mr. M. M. White and J. D. Hearne, had the approval of their boards when they borrowed money.

From New York, the witnesses on the subject of the custom are the President and Cashier of the Chemical Bank and five others—Clark, of the American Exchange; Hepburn, of the Third National; Townsend, of the Importers and Traders; Baker, of the First National; and Tappan, of the Gallatin. They all testify to the custom of officers of National banks loaning money without requiring the authority of the directors of the borrowing bank. Not one of these gentlemen ever borrowed a dollar for his bank. They are all lenders, and they never required a resolution of the board of directors to be furnished. Being lenders, they endeavor to confirm their own acts by their own testimony to sustain the loans which they made; and, even after the decision of the Supreme Court of the United States, to claim their views upon this question to be superior to that of the highest court in the land. Not one of them testified that the borrowing was done without the authority of the board of directors of the borrowing bank.

Mr. Quinlan, page 109, after testifying to the custom to make such loans, says they were usually made "on bills re-

ceivable, frequently receiving a certificate of deposit, and the receivables securing the certificate or loan; the certificate of desposit taking the place of a note, because the Comptroller of the Currency had for some years held that a national bank could not give a note, except its circulating notes."

He is then asked (Rec., p. 109):

Q. 13. "And it was to get around that decision that you adopted the plan of a certificate of deposit?"

A. "Excuse me. We didn't adopt the plan. The borrowing bank adopted the plan."

Q. 16. "You knew that the certificate of deposit was intended to represent a debt of the bank to the loaning bank?"

A. "We supposed this. We knew nothing whatever; but we supposed this, that in order to avoid re-discounts, the borrowing bank issued this certificate of deposit, which fulfilled two purposes—it increased their deposit line, which would be showing strength, and it did not appear as a rediscount or a loan."

Mr. Williams testifies (Rec., p. 115.):

Q. 11. "Why did your bank take a certificate of deposit?"

A. "A great many banks borrowing money wish to avoid the fact appearing in the statements that they are borrowing money, and a certificate of deposit appears among their liabilities as deposits. That was the reason, and is the reason why a great many banks borrow money on a certificate of deposit, secured by collaterals, rather than borrow on their own note, or on bills receivable. In that way nothing appears in their public statement showing that they are borrowing banks."

Dumont Clark testifies to the custom, and says in regard to the evidence of indebtedness, it was customary to take "Simply the paper which they had discounted with the endorsement of the bank upon its back; at other times we

would take a collateral note made by the bank; at other times a certificate of deposit made by the bank; in the last two cases collaterals would be attached to such instruments." —(Rec., p. 118, X Q. 2.)

Mr. Hepburn testifies as to the mode of making such loans:

"Loans were made upon a note—a collateral note—either time or demand, with the bills receivable of the borrowing bank as collateral, with the usual margin of twenty or twenty-five percent; also by discounting the receivables of the bank direct by placing the indorsement of the borrowing bank upon the same, and having the proceeds placed to their credit at the agreed rate of discount. Money was frequently borrowed also upon certificates of deposit upon a bank with the receivables of the bank put up as collateral for it. This was one of the forms of borrowing which was open to more or less criticism, and was made a subject of criticism by myself as supervising officer.

"The objection to borrowing upon a certificate of deposit, was that the banks borrowing money frequently reported the proceeds of their loans as deposits instead of bills payable, which, instead of evidencing their weakness by reporting bills payable, they advertised the public confidence in them by increasing the amount of their deposits." (Rec., p. 120, X QQ. 1, 2.)

Mr. Townsend testifies that such loans took the shape of the indorsement of the bank by one of its officers, with notes and rediscount of their bills occasionally, but not often certificates of deposit. (Rec., p. 130.)

Mr. Tappan says:

"In the majority of cases with us, the borrowing bank usually rediscounts paper, or puts up some security with the bank." (Rec., 133, X Q. 6.)

It will be noticed that the question put to all of these witnesses was:

Did the lending bank prior to that decision ever require proof of the authority of the officers of the borrowing bank in the shape of a resolution by the Directors, authorizing a loan?

Not one of the witnesses testifies to the bank he represented, ever borrowing money, or any knowledge of what was actually done by the officers of the borrowing bank. It may be that had the officers of the borrowing banks been called, the result might have been similar to that in Cincinnati; that they would not have assumed to borrow money without the authority of the Board of Directors. The situation at the two ends of the line was wholly different. At the lending end, collaterals were required sufficient to make the lender safe without looking to the responsibility of the bank. It held in its own hands the purse string from which it could pay itself; and it cared little whether the officers acted legally or not. But why was the question confined to the time prior to the decision of the Supreme Court? If the custom makes right, notwithstanding the decision, the right will continue as long as the custom prevails. Two of the New York witnesses are correct if the claim is valid. They testify that they have paid no attention to the decision, but act since the same as they did before. But we submit that no such custom has been proven, as can set aside the decision of the Supreme Court.

The whole testimony of the New York bankers shows a looseness in their mode of making loans—an autocratic claim of authority in the executive officers of national banks that makes the decision in the Western National Bank case timely and salutary. It is time that some limit should be placed to their powers. It is time that the Board of Directors should

be compelled to perform their duties, and manage the national banks as the law intended they should. Scarcely a failure of a national bank has occurred that has not been occasioned by the acts of the executive officers in indiscriminate loans and use of its funds, which would not have occurred if the Board of Directors had performed its duties.

We respectfully submit that such testimony can not make that legal which the highest court in the land has declared to be illegal.

The contention is, and the testimony was offered for the purpose of proving, *not* that the borrowing bank permits its officers to borrow without authority given by its Board of Directors, but that it is not customary for the lending bank to require such executive officers to *exhibit their authority*. In other words, the claim is, that the executive officers, duly authorized by the Boards of Directors to borrow, have been trusted so long and so uniformly by the lending banks without exhibiting their credentials that the lending bank has now a legal right to assume that the executive officer has been duly authorized to borrow by the Board of Directors, whenever he applies for a loan. Clearly, the custom was illegal in its inception. The first lending bank that omitted the precaution of asking for the special authority could not have recovered the loan if the authority had been wanting. How long, we respectfully ask, does it take for lending banks to extend the authority of limited agents in this manner? How are banks, that do not need any money and do not wish to borrow any, to protect themselves against this extraordinary power bestowed upon their agents by designing banks that have capital to loan in large amounts? Here was a Vice-President, not usually an active officer as the testimony shows (Rec., p. 145, Q. 12), and whose activity was entirely unknown to the Chemical bank, so far as the testimony dis-

closes, trusted without any actual authority and without being required to show any. If this theory of the law is correct we see nothing to prevent sellers by custom extending indefinitely the limited power of the agents of buyers. It is a dangerous doctrine that permits one class to establish a custom affecting the rights of an adverse class.

In view of the decision of this Court in The Western National Bank vs. Armstrong above cited, it seems idle to discuss the question further, or to consider the cases in which this authority was attempted to be sustained, or to discuss the question whether the evidence of custom given in this case is to be the basis of the special authority required by the decision and the law. It is simply placing the views of certain bank officers as to their authority above that of the Supreme Court. It is to fritter away and annul the force of that decision; to destroy the benefits which must follow that decision, by which it was intended to stop the headlong course of irresponsible officers from wrecking their banks by exercising powers not belonging to them, and bringing loss and bankruptcy upon the stockholders whom they are elected to serve. How can the evidence of officers, who according to the Supreme Court, have acted illegally, be made the means of legalizing those very illegal acts?

To show how little force should be given to this testimony, we desire to call the attention of the court to the admissions made by several of these witnesses. It will be remembered that the present loan was made upon a certificate of deposit made by the Fidelity to the order of E. L. Harper. This certificate represented that Harper had deposited in the Fidelity $300,000, which would be repaid upon the return of the certificate; that the bank had in its vaults that much money belonging to Harper, and on the faith of that document the loan was made. This paper, on its face, belonged

to Harper. Why should the bank borrow money when it had the money in its vaults? Harper might desire to cash the certificate, and he acted on the theory that it was his, and that the money loaned in this case was on his property. This would be the natural inference from the paper to one not initiated into the secrets of banking. But again custom comes in, and the same bankers testify that they regarded this as the note of the bank. It was customary to treat it as such. Why was this custom adopted? Mr. Hepburn explains it: They, instead of "evidencing their weakness by reporting bills payable, advertised the public confidence in them by increasing the amount of their deposits." In other words, by borrowing money in this way they represented to the Comptroller of the Currency, and to the public, that they had increased their money in bank, and had not increased their liabilities. This procedure was a fraud upon the department and the public, but is announced by the same witnesses as to custom as a regular and legitimate mode of banking sustained and legalized by custom.

It is time that banking should be governed by law, and not by what bank officers think their positions and powers entitle them to establish as fixed custom.

We respectfully submit that the opinion of the learned Judge in the Circuit Court of Appeals on this subject is not in accord with the claim of counsel for the Chemical Bank. While they undertook to show a custom of lending banks not to require the executive officer of the borrowing bank to exhibit his authority, the learned Judge appears to hold that the custom dispenses with the necessity of any authority from the Directors. Counsel argue that, as no authority is required to be exhibited by custom, the Chemical Bank had a right to rely on such custom and act without any exhibition of authority. Of course, in that case it would

be immaterial whether there was any authority or not. The Court argues that if the Directors could authorize the executive officer to borrow by resolution of the board, they could authorize him to borrow by acquiescing in a well-known usage. It is certainly true that authority can be conferred by acquiescence, but it is difficult to see how the Directors can by non-action ratify authority attempted to be conferred on their agent *by the party with whom he was undertaking to deal.* An agent derives his power from the principal, not from the adverse party with whom his principal is dealing.

It is next insisted that the Board of Directors, by neglecting their duties and permitting Harper to manage the affairs of the bank without supervision, delegated sufficient authority to him to render the transaction valid.

However negligent the Directors may have been in permitting Harper to usurp their authority, there is no evidence to show that the Chemical Bank at the time of the loan had any knowledge of such usurpation. It is not pretended that the Chemical in making the loan *relied upon* any apparent authority conferred by the Directors. The Directors themselves are but officers of the bank, and wronged the bank if ever they permitted Harper to do an act they should have done themselves. The bank should suffer the consequences of authority impliedly conferred upon Harper by the wrongful conduct of its Directors when innocent parties have been misled by such conduct, but why extend the punishment further? The Chemical Bank did nothing but what it would have done had the Directors always exercised the most careful supervision over its affairs. The conduct of the Directors conferred no *actual* authority on Harper especially in a matter where the personal judgment of the Directors was required.

In the case relied upon by the learned Judge in the Circuit Court of Appeals, Martin vs. Webb, 110 U. S. 7, Mr. Justice Harlan, speaking of the implied authority of a Cashier, says, "When, during a series of years, or in numerous business transactions, he has been permitted, without objection and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between the bank and those who, *in good faith, deal with it upon the basis* of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operations." (Italics ours.)

It is not claimed in the present case that the Directors specifically ratified the making of the loan, or that any one of them knew that it had been made. Nor does the plaintiff show any such conduct of the Directors from which authority to borrow this money can be implied. It is not shown that money had been borrowed by Harper, prior to this time, and with the knowledge of the Directors.

All of the present living Directors, except Harper, have been examined by one side or the other—four in all. They testify that they never heard of the loan until after the failure of the Fidelity. Messrs. Gahr, Pogue, Matthews and Kineon all testify that they had no such knowledge until after the failure, except Gahr, who heard from Harper, three or four days before the failure, that he had made loans from Eastern banks. No Director testifies that he knew or had heard of any such loans.

Mr. Hinch says that Harper dictated as to all the operations of the bank, but immediately confines that as to what should be held over as cash items, as that was all that came under his jurisdiction. Mr. Kineon testifies that Harper did everything; that he ran the whole bank; Mr. Kineon made efforts, he says, to have the loans examined, but wholly failed, and sold his stock to Harper, and stepped out. He

did object to the mode in which the business was managed, and discussed it with Mr. Swift, the President, but it was all in reference to loans of the bank funds by Harper. No question was made as to Harper borrowing money.

Mr. Alter testifies in almost identically the same manner. He testifies that he was refused access to the call loan account, and in consequence he resigned.

A. P. Gahr testifies that the stock which he held belonged to Harper, and, that so far as he knew, the transactions in the way of loans and discounts were not submitted by Harper to the Directors.

Mr. Matthews testifies that he always spoke to Harper about the business with the bank, which referred to discounts for Swift's Iron and Steel Company, and carrying checks of that Company in the drawer as cash.

Mr. Pogue testifies that possibly Harper was the managing man of the bank. Swift, the President, was there daily, except when absent on vacation. There was a Committee on Loans, and reports on loans and discounts were made to the Directors. This testimony only shows that Harper was the general manager of the bank. It shows further that the matters in which he acted without consulting the Board, and about which complaints were made, were as to the loans and discounts. These were all matters which, according to the Supreme Court, belonged to the business of banking, and about which the officers had authority. There is not a syllable of testimony from anyone that any Director knew of Harper borrowing money in the name of the bank—of permitting him to borrow money—so as to give an implied authority, as far as the Directors could do so, to borrow money.

In the case of the Western National Bank, it was testified that Harper was the Vice-President and managing officer,

and that by this the witness meant that Harper was "the general manager of the business of the bank," but this Court says, after quoting this testimony, that "it can not be pretended that as such he had power without the authority of the Board to bind the bank by borrowing $200,000 at four months' time."

There is no evidence that the Board of Directors knew at any time that Harper was borrowing money in the name of the bank, either before or after the case now before the court. There is not a fact brought to the knowledge of any one of the Directors in the testimony which should have led him to suppose that Harper was borrowing money for the bank. There was great confidence placed in him. There was a knowledge that he was making loans and doing other acts of his own will, but they were all in matters belonging to the legitimate banking business. Such knowledge can not bring home to them a suspicion even that he was engaged in acts outside his legal powers and illegitimate in banking business.

The effect of the testimony on this subject is to show that the Directors neglected their duty in not looking into the business *which Harper had a right to do*. It was not necessary for them to act in order that a loan of the bank's funds by Harper should be valid, but it was their duty to see to it that Harper did not lend the money recklessly. How a failure to supervise the business that he had a right to transact can confer upon him authority to transact business which required *their action* is not apparent. Still less apparent is it how the Chemical Bank can be justified in assuming that the Directors had delegated their authority to him when it did not even have notice that the Directors were neglecting any part of their duties.

Let us look for a moment at the authorities upon this

question, so as to know definitely what is necessary for the ratification of an unauthorized act.

Meacham on Agency, Section 129, says:

"It may, therefore, be stated as a general rule, that except in those cases where the principal intentionally assumes the responsibility without inquiry or deliberately ratifies, having all the knowledge in respect to the act which he cares to have, any ratification of an unauthorized contract, in order to be made effectual and obligatory upon the alleged principal, must be shown to have been made by him with a full knowledge of all the material facts connected with the transaction to which it relates; and especially must it appear that the existence of the contract and its nature and consideration were known to him."

"If he knows the facts, it is enough. But if the material facts were suppressed, or were unknown to him, except as the result of his intentional and deliberate act the ratification will be invalid, because founded upon mistake or fraud."

And in Section 148:

"It is a rule of quite universal application that he who would avail himself of the advantages arising from the act of another on his behalf, must also assume the responsibilities. If the principal has knowingly appropriated and enjoyed the fruits and benefits of an agent's act, he will not afterwards be heard to say that the act was unauthorized. One who voluntarily accepts the proceeds of an act done by one assuming, though without authority, to be his agent, ratifies the act, and takes it as his own with all its burdens as well as all its benefits. He may not take the benefits and reject the burdens, but he must either accept them or reject them as a whole. But here, as in other cases, it is indispensable that the principal should have the full knowledge of the material facts, or that he should intentionally have accepted the benefits without inquiry, otherwise the receipt and retention of the benefits of the unauthorized act is no ratification."

Morse on Banking, Section 101, says:

"Any act done avowedly for the bank may be adopted with full actual knowledge of the facts, so as to have the *same effect as if previously authorized by the same power which ratifies.* * * * * * *"

"If the directors or a majority of them know actually, not constructively of the contract and acquiesce, it is a ratification without any vote."

"It is a well settled rule that a ratification by the principal of the unauthorized acts of the agent, in order to be effectual, must be made with a knowledge on the part of the principal of all the material facts. And the burden is upon the party who relies upon the ratification to prove that the principal, having such knowledge acquiesced in and adopted the acts of the agent. It is not enough for him to show that the principal might have known the facts by the use of diligence."

"It is incumbent on the plaintiff to show that the directors, or at least a majority of them, knew of the contract, and its terms, and that with such knowledge they acquiesced in and adopted it."

"So where the cashier of a bank had been carrying on transactions with the bank contrary to its rules, for his own benefit, it was held that the fact of such transactions having been entered on the books of the bank, did not import knowledge on the part of the directors and consequent ratification."

Wheeler vs. *Northwestern Sleigh Co.*, 39 Fed. Rep. 347:

"Did the retention by the plaintiff of the avails of the stock amount to a ratification? The plaintiff received as avails of the stock the exact amount for which he had authorized his agent to dispose of the stock. He had no reason to suppose that any false representation had been made, or that his agent had assumed to dispose of any other prop-

erty than the stock as the consideration of the money paid by the purchasers, and received by him. Under such circumstances, the retention of the money can not be held to be a ratification by him of the unauthorized acts of the agent because it was retained without knowledge of the facts."

Smith vs. *Tracy*, 36 N. Y. 79:

"In the case before us, it is claimed that the receipt by the testator of the proceeds of an unauthorized sale, is to be deemed an adoption of a contract, made without his authority, and to which he never knowingly assented. Such a ruling would be subversive of well settled legal principles, and would open the door to illimitable frauds by brokers, factors, attorneys, and others, clothed with limited powers, and occupying strictly fiduciary relations."

Baldwin vs. *Burrows*, 47 New York, 199:

"The receipt even from an agent of money paid him on a contract, would not bind the principal to the contract, unless he knows on what account the money was received, and the terms of the contract."

"The mere fact that the proceeds of a contract made by one person in the name of another, without authority or a portion of them, have come into the hands of the latter, is not of itself sufficient to render him liable on the contract. To have that effect, the proceeds must be received not only with knowledge, but under such circumstances as to constitute a voluntary adoption of the contract. When goods are purchased by one assuming without authority to be the agent of another, if the latter knowingly received the goods so purchased as his *own property*, this will amount to a ratification of the agency. But if he denies the authority of the pretended agent to act for him, or having knowledge of his acts, and afterwards receives the goods as the property of the assumed agent in payment of a debt due from him, it will not amount to a ratification."

In *Phosphate of Lime Co.* vs. *Greene*, L. R. 7 C. P., page 55, Justice Welles says:

"If the act done be unauthorized, the law makes it absolutely void at the election of the persons on whose behalf it is done, so that he may repudiate it, or take the benefit of it, as he chooses; but it is not a relative nullity, in the sense that the person not choosing to ratify it is to perform some condition precedent, or do some act, before he declares it to be void. It comes round, therefore, to this alternative; either the defendants must establish that the directors had authority at the time, or that the company did, by their subsequent conduct, assent to and ratify the act of the directors so as to bind themselves as if there had been a previous authority."

Page 56:

"The principle by which a person on whose behalf an act is done without his authority may ratify and adopt it, is as old as any proposition known to the law. But it is subject to one condition; in order to make it binding it must either be with full knowledge of the character of the act to be adopted, or with intention to adopt it at all events and under whatever circumstances."

And in *Combs* vs. *Scott, et al.*, 12 Allen (Mass.) 493, the Court says:

"Ratification of the unauthorized acts of one who assumes to be an agent, in order to render them binding on the principal, must have been made with full knowledge of all material facts, and ignorance of such facts, whether it arises from want of inquiry by the principal and neglect to ascertain the facts, will render an alleged ratification ineffectual and void."

In *Thatcher* vs. *Pray*, 113 Mass. 291: Thatcher left a horse with one Gray for safe keeping. Gray, without authority, sold the horse to the defendant, and received for it a

check for $100. Thatcher had a claim against Gray for potatoes sold to him, and Gray forwarded to him the defendant's check which the latter had given him for the horse, to be credited to his account, and the plaintiff received the check and credited it on account of the potatoes, having no knowledge at the time that his horse had been sold.

"Held that the plaintiff's receipt and collection of the check were not a ratification of the sale, and that he had a right to appropriate the check to the extinguishment of the debt in payment of which it was given to him."

In *Bohart, Dillingham & Co.* vs. *Oberne, Hosick & Co.*, 36 Kansas, 284, it is held:

"Where an agent makes a contract outside of his actual and apparent power, and the fruits of his contract are received by his principals in ignorance of the material facts, and without any knowledge that the contract had been in their behalf or names, but were received and retained by them upon the information and understanding that the money was paid to ratify in part a liability existing against the agent, and in their favor such receipt and retention will not amount to an adoption and ratification of the unauthorized contract"

In *Schutz, and others, v. Jordan, and others*, 32 Fed. Rep. 55, decided by Justice Wheeler, the defendants, who were merchants, discovered that their superintendent was inclined to carry more goods in a certain department than was desirable, and directed him to keep down the stock; the salesmen of plaintiffs called to sell more goods in that department, and was informed of this direction, but the superintendent agreed that they might send more goods if they would not have any statements of account or dunning letters sent to the house. This scheme was communicated to the plaintiffs, who assented to it, and afterwards sent large quantities of goods to the house, which were received by the superintend-

ent, some of the bills paid by his direction, and many of the goods sold in the usual course of trade. When the defendants discovered what had been done, they laid out all the goods received from plaintiffs, in order to ascertain if any of them were goods which had not been paid for, but were unable to determine this, and the goods were then put back in stock and sold.

"Held that the defendants did not ratify the unauthorized act of the superintendent by retaining and selling the goods after discovery, and that the plaintiffs could not recover the price of them."

First National Bank of Burlingame, v. *Hanover National Bank of New York*, 66 Fed. Rep. 34: Sheldon was the President of the First National Bank, of Burlingame. At his request, the First National Bank, of Hanover, discounted his note for $5,000 under an alleged agreement that if not paid at maturity, it should be charged to the Kansas bank. The proceeds of the collection by Sheldon's direction were placed to the credit of the Kansas bank. Thereupon, Sheldon directed the proceeds to be charged to the New York bank, and credited to himself. The note not being paid, it was charged to the Kansas bank. Upon these facts the court below charged the jury as follows:

"If you find, from the evidence, that there was originally a defect of authority upon the part of the parties to this transaction, and if you further find that the defendant bank retained and enjoyed the proceeds of the transaction made by Sheldon, that would constitute acquiescence, as effectual as the most formal ratification afterwards, and the defendant, if you find that to be the case, would be estopped from resisting the demand of the plaintiff here. That is a matter for you to determine from the testimony, for upon the question of authority the testimony is conflicting, and you must determine it for yourselves."

The Circuit Court of Appeals held:

"An exception was taken to this portion of the charge on the ground that there was no evidence tending to show that the defendant bank received and had the benefit of the loan in controversy. We think this exception was well taken. We have stated the only evidence the record discloses on this subject, and from it clearly appears that the Kansas bank was used by Sheldon as a mere conduit through which to pass the proceeds of the discount from the New York bank to himself. Just as soon as he learned that the New York bank had credited the Kansas bank with this money on its books, he caused it to be charged to the Kansas bank (should be New York bank), and credited to himself on the books of the latter, and he used it. The Kansas bank neither retained nor enjoyed the proceeds of this discount; nor did it receive any interest, commission, or other benefit from the transaction. As there was no evidence that it retained or enjoyed the proceeds of this discount for the jury to consider, the instruction that such intention and enjoyment might work an estoppel of the right of the bank to question the authority of its officers to charge it with the liability in issue obviously tended to mislead the jury."

The proceeds of the loan in that case were enjoyed by the Kansas bank precisely in the same way as the proceeds of the loan in the present case by the Fidelity. It was checked out by the Kansas bank in its regular business, just as was done by the Fidelity Bank in this case.

To the same effect is the case of *State National Bank* vs. *Newton National Bank*, 66 Fed. Rep. 694, in which the Court says:

"That the proceeds were received and used by the investment company and not the Newton bank; that they were placed to the credit of the Newton bank on the books merely as a convenient mode of transmitting the same to the investment company."

Here, too, it was a question of the authority of the cashier to make the contract, and it was claimed the reception of the money by the bank was a ratification of his act.

And in the Western National Bank case, the Court says:

"The mere placing of the money in the name of the Ohio bank involved no ratification by the bank, unless it was so placed with their knowledge and assent; nor did the withdrawal of the money by drafts, drawn by Harper or by his direction in the name of the bank, constitute a receipt by the bank of such money, unless it was in point of fact received and used by the bank for its benefit."

How do these authorities apply to the present case, and what questions involved here do they settle?

1. The loan was an unauthorized one, and therefore not binding on the bank.

2. The crediting of the proceeds of the alleged loan by the Chemical on its books to the Fidelity, does not, of itself, make the latter liable.

3. Whatever acts may be claimed to amount to a ratification of the loan, must be shown to have been done by the Directors of the bank, with a full knowledge of the facts.

4. If the Fidelity was merely used as a conduit through which to pass the proceeds of the loan to Harper, and those proceeds were taken by him, there was no reception or enjoyment of the proceeds by the Fidelity.

The third ground upon which the Circuit Court of Appeals distinguishes this Case from the Western National Bank vs. Armstrong, 152 U. S. 346, is in what is claimed to be a ratification of Harper's unauthorized transaction by the Fidelity Bank, especially by not taking notice of informa-

tion on the subject of the loan conveyed by accounts transmitted to the Fidelity Bank by the Chemical.

The substance of this claim is, that the Chemical, by sending a statement of its account to the Fidelity, gave it information in regard to the loan, of which it was bound to take notice; that the monthly statement of the account for March, 1887, as it stood upon the books of the Chemical, transmitted by that bank to the Fidelity, was notice to it that Harper had undertaken to borrow $300,000 for the Fidelity, and that by acquiescing in that statement the Fidelity Bank ratified the loan.

The only knowledge claimed to have been brought home to the Fidelity of this loan, was the letter of March 2, 1887, (Rec. p. 29) and the account of April 1st, containing the credit as a "tem. loan" of the $300,000. (Watters' Exhibit, No. 10, p 1.) This account was handed to Watters, examined by him, and filed away (Rec. p. 68 Q. 49), and there is not a particle of evidence that the letter was ever seen by any Director except Harper, nor the account by any person except Watters, and probably Harper. Knowledge of these transactions by Harper is not the knowledge of the bank.

American Surety Co. vs. *Pauly*, 170 U. S. 133.

Mr. Justice Harlan, delivering the opinion of the court, says: "The presumption that the agent informed his principal of that which his duty and the interests of his principal required him to communicate does not arise where the agent acts or makes declarations not in execution of any duty that he owes to the principal, nor within any authority possessed by him, but to subserve simply his own personal ends, or to commit some fraud against the principal. In such cases the principal is not bound by the acts or declaration of the agent unless it be proved that he had at the time actual

notice of them, or, having received notice of them, failed to disavow what was assumed to be said and done in his behalf."

In the present case, Harper, possibly with the assistance of the Cashier, was engaged in fraudulent practices, and robbing the bank. His knowledge of the transaction through which he was effecting this robbery, was not the knowledge of the bank or of the Directors. The inference is that he would not inform the Directors of such transactions, and the evidence in the case shows that he did conceal everything relating to this matter from them. It is shown that the account of April 1st was never shown to the Directors. The credit on the Fidelity books, had they seen it, did not indicate a loan. How then would the sending of this account, with those two words on it, notify the Directors, who never saw it and who would not be expected to examine the accounts between the Fidelity and other banks, that Harper had borrowed $300,000 in the name of the bank. It is not enough to show that it was the duty of the Directors to have known what was in these accounts, or that they would or might have known it if they had performed their full duties. Knowledge must be brought home to them actually, and not constructively, before ratification by them will be held as against the bank. The following case is in point on this question:

Murray vs. *Nelson Lumber Co.*, 143 Mass. 251.

The Court below instructed the jury as follows:

"But all directors of a corporation are presumed to know what it is their duty to know, what they are able to know, and what they undertook to know when they accepted the responsibility of directors, and a jury have the right to suppose that the directors of a corporation have knowledge of its concerns. In the absence of direct and positive evidence of the knowledge of the directors, jurors have a right to assume

that they are doing what they are appointed to do, and that they know what they are appointed to know."

Held, that these last instructions were erroneous.

And the Court further says:

"In the case at bar, therefore, it was incumbent on the plaintiff to show that the Directors, or at least a majority of them, knew of the contract and its terms, and that with such knowledge they acquiesced in and adopted."

Is there any evidence that the directors of the Fidelity knew that this money had been borrowed by Harper for the bank?

Great stress is laid by the learned Judge who delivered the opinion in the Circuit Court of Appeals upon the fact that the account of the Fidelity Bank for March 1887, transmitted by the Chemical Bank about the 1st of April, 1887, and received by J. Harry Watters, book-keeper of the Fidelity, contained an item to the credit of the Fidelity thus: March 2, 1887, "Tem. loan $300,000."

If this were an item *against* the Fidelity there would be more force in the argument. A statement of the debit items imposes a duty upon the alleged debtor, whether a bank or an individual, to correct the item charged against him if there is anything wrong about it. A depositor knows more certainly than the bank whether the check purporting to be given by him is a forgery or not. When his account is shown him he owes a plain duty to the bank to notify it promptly of any erroneous charges. The duty of directors is to guard the interests of their bank. They owe no duty to guard the interests of persons giving *credit* to their bank. If they in fact know that another bank is lending them money of course their bank is responsible for the loan, but on what principle of law or equity are they required to know whether

another bank is loaning them money or not? Banks are not conducted on altruistic principles. It was the duty of the *Chemical* Bank, its officers or directors, to see that its funds were not loaned to an agent who had no authority to borrow. How can that duty be shifted to the officers or directors of the Fidelity so as to impose an obligation upon them to see that none of their officers *have* borrowed money without authority?

The cases cited by the Circuit Court of Appeals do not seem to us to sustain the contention that the Fidelity was bound to inspect carefully the account transmitted to it to see if it was credited with the proceeds of any loan.

Leather Manufacturers' Bank vs. Morgan, 117 U. S. 96, was the ordinary case of a depositor properly charged with a forged check on account of his failure to investigate the statement of his account sent him by the bank.

In Kissam vs. Anderson, 145 U. S. 435, relied on by the court, certain New York brokers illegally received funds of the Albion Bank by drafts drawn by its president to their order against the deposit of the Albion Bank in the Third National Bank of New York, the brokers knowing that the president was misappropriating the bank's funds in his private speculations. By the direction of the president they had made some deposits in the New York bank to the credit of the Albion bank, which they sought to have set off against the claim of the Albion bank. The question was, whether statements of account transmitted by the New York bank to the Albion bank showing these deposits to its credit by the brokers charged the Albion bank with knowledge that the deposit was made. It was held that the Albion bank was charged with notice.

Mr. Justice Brewer, in deciding this case, says:

"They (the brokers) deposited it to the credit of the

Albion Bank, and it was for the officers and directors of that bank to take care of its deposits. The rule might be different if Warner, the cashier of the Albion Bank, was the only officer authorized to draw on the Third National Bank, or charged with knowledge of the state of the account; but the president and teller had equal authority, and were equally chargeable with knowledge."

"At the least, it was a question to go to the jury whether the officers of the bank other than Warner, in the exercise of reasonable and proper care, could have ascertained that their moneys had been deposited to the account of the Albion Bank and would or would not have accepted such deposits as the return of the moneys to the bank."

The matter of the deposits of the bank belonged to the ordinary business of banking, and the officers of the bank, a part of whose duty it was to supervise deposit accounts, may well be held to notice, which will bind the bank of the state of such accounts. But to go further and hold that notice to officers or tellers in matters as to which they have no power, and in matters of not legitimate banking, and so as to affix a liability upon a bank by certain words in an account—a liability which only could be incurred by the directors themselves —and which account they never saw, and which it can scarcely be expected a director of a bank would see, is not, we submit, within the rule laid down in the above case. It is an attempt to foist, on the notice of a credit which belonged to the legitimate business of the bank, notice of a liability which it had no right to incur, and which directors had no reason to suppose was being incurred. Notice of a credit is no notice of a liability growing out of the credit. As in this case, as said by Mr. Justice Brewer, the rule might be different if Warner was the only officer—so here it is different when the Board of Directors is the only authority to incur the liability.

But let us see exactly what the notice, which it claimed, will render the bank liable, amounts to. Appellee's attorney has laid great stress on the part that early in April, the Fidelity Bank received from the Chemical, an account current of the transactions between the banks during the previous month. A copy of this account is printed separately as Watters' Exhibit, No. 10. In that account, under the date of March 2, appears on the credit side of the account the following:

1887 | Mch 2 | Tem. Loan 300,000

There are in addition several copies of letters and accounts called reconcilement sheets, sent backwards and forwards between the banks. All of these except the first, are mere matters for the bookkeepers in correcting errors, and in none of them does the item in controversy appear, and we can not see that any one of them could give notice of the alleged loan to any person who might have examined them.

Watters' Exhibit, No. 10, was received in the first instance by Watters, the general bookkeeper of the bank (Rec. p. 67, Q. 48). This account was received by him checked O. K., and filed away among the papers of the Fidelity National Bank. On March 2, Mr. Watters had received from Mr. Harper the charge and deposit tickets by which this item was charged to the Chemical and credited to Harper. This was the mode by which any sum deposited in New York for Harper's account would be transferred to him, and Watters naturally supposed that to be the explanation of this transaction. When, therefore, he received the account current and saw this item, he checked it as correct, and it excited in his mind no suspicion that it was different from what the entries in the Fidelity books indicated. He testifies that in view of these entries he would infer that this loan was made

to Harper. He has no recollection, however, of noticing it at all. But was it an entry which would in the ordinary course of business have come within the knowledge of the most vigilant director of a National Bank? If not, how can it bring notice of a loan to the bank home to the Board of Directors? Would such a board, exercising the greatest possible care over the affairs of the bank, reasonably be supposed to have seen this entry on that current account? Such a vigilance might have led them to inspect the Fidelity books, but such an inspection would have shown the transaction not to have been a loan, but a deposit for Harper's benefit, and the money drawn out by him. Bearing in mind the position that the loan must have originally been authorized by the Board of Directors, or that the board, with knowledge that such a loan had been made, ratified it—the evidence furnished from this account wholly fails to sustain any such ratification.

But it is claimed that Armstrong ratified this act of Harper. Ratification is based largely on the doctrine of estoppel. How can estoppel apply as against the receiver? How did any of his affect the rights of the plaintiff bank so that it would be unjust at this time to claim the loan to be unauthorized? He had no power to ratify an unauthorized act of an officer of the Fidelity. His sole duty was to collect the assets of the Fidelity Bank, and under the directions of the Comptroller of the Currency, allow or reject claims, pay dividends, and settle up the affairs of a bankrupt bank. Did he deceive in any way the Chemical National Bank to its injury? Did that bank part with any rights, or surrender any property or claim on the faith that the receiver did not make any defense or objection to the acts of Harper? But he did reject the claim as soon as it was presented to him. When sued in this action, he did answer that the claim was

a debt of Harper, and not of the bank. What more could he do?

It is true that he brought suit against the Directors of the bank for damages sustained by the bank through the frauds of Harper, and claimed that the Directors had been negligent in attending to their duties, and in the continued employment of Harper. This it was his duty to do. He also named the present alleged loan as one of his fraudulent acts. That suit was not to recover from Harper the amount of that loan as having been paid to him. It was for damages growing out of his fraudulent acts, and could not in any way affirm and legalize what would otherwise be illegal. A large number of his fraudulent acts were set up in that suit, and it was claimed that by them the bank had been wrecked, and the stockholders damaged by the loss of the value of their stock. The suit was for damages done to the bank by the negligence of the Directors. This suit was compromised by the payment of $450,000 by the Directors. We can see nothing in that whole case to show a ratification by the receiver, if such a thing were possible, of the illegal acts of Harper.

This damage was done to the bank whether this claim is a valid or invalid one. In either case this act was a factor in bankrupting the bank and a subject for damages against the Directors for placing Harper in the position which he occupied.

It is finally claimed that the Fidelity National received and enjoyed the proceeds of this loan, and in that way ratified the unauthorized act of Harper. It must be remembered that as a general rule, ratification is not binding, unless the party knew all the facts in the case at the time he is claimed to have ratified. If, however, he in fact received

and enjoyed the proceeds of the act, it would be unjust to permit him to disavow the act and retain the proceeds. But this receiving and enjoying the proceeds, must be a substantial and not a formal one, and it must be a reception and enjoyment of them as the proceeds of the unauthorized acts—knowing that they are the proceeds of such acts. If he receives and enjoys them without such knowledge, and disposes of them to other than his own use, or to a use which at the time he supposed he had a right to apply them, it is no ratification of the acts.

In the present case, the proceeds were credited by the Chemical to the Fidelity National Bank; on the same day that credit was transferred on the books of the Fidelity to Harper, and the amount paid to him on his checks; and when the credit in the Chemical was withdrawn, it was not withdrawn as the proceeds of a loan to the bank, but as money belonging to the bank, due to it by reason of the deposit to Harper and the checking out of that deposit. How Harper knew on that day that the credit had been given, does not appear. He may have presumed from the previous correspondence that it had been given, or he may have had telegraphic information of the fact. In fact the credit had been given on that day, and there is no doubt the entries on the Fidelity books referred to that credit, and it was the credit then made that was transferred to Harper, and checked out. The moment this sum was charged to the Chemical on the Fidelity books, it was credited to Harper. It was then drawn out by him for his own uses. The bank was no richer after than before the credit was given. It makes no difference that this was a fraudulent act on the part of Harper, or that the Chemical had no knowledge of Harper's fraud. It is immaterial why the Fidelity did not obtain the use of this money; the question is, whether it did actually as a matter

of fact obtain the use of it; or whether Harper obtained the use of it by transferring the sum to his individual account. In the case of the Western National Bank, the proceeds of the loan were deposited to the credit of the Fidelity. It was drawn out of the bank by the official drafts of the Fidelity upon blanks the same as used by it in all its business, signed by officers who confessedly had the right to sign such drafts, and paid by the Western in the faith and belief that they were the lawful drafts of the Fidelity Bank. The fraud of Harper was, in the present case, no greater; it no less bore the marks and adopted the modes of regular business transactions; it was no more carefully concealed from the Directors nor from the other end than in that case. The transfer of the funds to Harper was made in the regular mode of doing business. On March 2, 1887, Harper, the Vice-President of the Fidelity, presented to the book a piece of paper containing the words, "charge Chemical, $300,000. Credit E. L. H. $300,000, transfer of funds." The different clerks did make these entries. They charged that sum to the Chemical, and credited it to Harper, and those are the only entries on the Fidelity books of the transaction. This was no remarkable or unusual act of the vice-president of a bank. Mr. Goodman, on page 161, Mr. Rowe, on page 164, Mr. Yergason, on page 169, and Mr. Griffiths, on page 172, testify that the transfer of funds made in this manner is usual in the banking business, and that it would be the duty of the bookkeeper, on being presented with such a ticket, signed by the executive officer of the bank, to make the exact entries which were made in the present case. In the language of Mr. Rowe, "if a ticket in the form of the one used by Harper was presented by the vice-president to the bookkeeper, it would be the duty of the bookkeeper to make these entries"; and, as was remarked by another witness, if he should refuse

to do so, he would be discharged from the bank. There was nothing, therefore, unusual in this mode of transferring the funds. The effect of it was to give Harper the entire amount of the credit; to make the Fidelity the mere conduit through which the transfer was made, and when the Fidelity used the money, it was as its own, by virtue of the transfer to Harper. Harper, by that act, converted the sum to his own use. Had the loan been made to Harper individually, and the proceeds, by his direction, credited to the Fidelity by the Chemical, the same course would have been pursued, and the Fidelity would have received and enjoyed the proceeds of that loan as much as it did the proceeds of the present one. When these entries were made, the credit became the property of the Fidelity, and, in using the money, it was simply using money given to it by Harper for that purpose.

In the case of *Thatcher* vs. *Pray*, already cited, Thatcher left his horse with one Gray for safe keeping. Gray, without authority, sold the horse to Pray for one hundred dollars, and received his check for it. Gray assigned this check to Thatcher who cashed and used it; but applied the amount to the payment of another debt which Gray owed him. It was held by the Supreme Court of Massachusetts that the reception and use of the money was no ratification.

And again, Bohart, Dillingham & Co. vs. Oberne, Hosick & Co., 36 Kansas, 284, the reception and use of the money was held to be no ratification, because it was paid in part to satisfy a liability against the agent in favor of the principal. And so in First National Bank of Burlingame vs. Hanover National Bank, 66 Fed. Rep., 34, a note was discounted for the president of the bank under an alleged agreement on his part that if not paid at maturity, it should be charged to the bank. The proceeds of the loan were credited to the bank, and transferred by it to the credit of the president precisely

as was done in the present case, and the bank then checked out the proceeds of the discount in its regular business, yet the Circuit Court of Appeals held that the bank neither retained nor enjoyed the proceeds of this discount, and that there was no ratification of the unauthorized act of the president. No more than this was done by the Fidelity. The proceeds were placed to its credit by the Chemical; by transfer of funds the proceeds were credited to Harper, and then checked out of the Chemical in the regular course of business; and yet Justice Thayer says: "The bank neither retained nor enjoyed the proceeds of the discount." And in just the same manner, so far as the Western National Bank was concerned, were the proceeds of the loan in that case retained and enjoyed by the Fidelity. They were placed to its credit, and the proceeds checked out by regular drafts of the bank, signed by the proper officers, and paid by the Western National in good faith.

It is no ratification because it was used not as the proceeds of a loan made to the bank, for the Directors did not know that such a loan was made, nor did its books show such a loan, but the contrary—but was used as its own, deposited in the bank by Harper and credited, and paid to him.

It is true that the Chemical had no knowledge of the entries made on the Fidelity books, nor of the frauds of Harper. Neither did the Western National Bank know the frauds that had been committed by Harper. In both cases, however, the loan was an unauthorized one—an illegal one. It was made on the application of one who had no right "to exercise such a power," "and by one presumed to know the powers of that officer." The placing of the money to the credit of the Fidelity was the culmination of this unauthorized and illegal act, and it enabled Harper to consummate the fraud by transferring the proceeds of the alleged loan to

himself. Had not this illegal loan been made, Harper could not have fraudulently obtained this money. Had the Chemical required a resolution of the Board of Directors of the Fidelity to authorize this loan before making it, Harper would never have appropriated the money. As the illegal act of the Chemical made the fraud possible, it requires something more than the use of the money in the way in which it was used to make the bank liable. It requires knowledge of the fraud in the Directors of the bank; it requires that when they used it, they knew that it was proceeds of a loan made by the Chemical to the bank, and not as a sum credited and paid to Harper, and used as a compensation for that credit.

The authorities here cited, it seems to us, clearly establish the position that in the present case there was no such enjoyment of the proceeds of this loan as will ratify the unauthorized act of Harper.

It is claimed in argument that Harper defrauded the Fidelity, not the Chemical, and that the borrowing from the Chemical had nothing more to do with his taking $300,000 from the Fidelity, by having that amount entered to his credit, than if he had taken cash out of the vaults. We do not see how it would benefit the appellee if Harper had taken the $300,000 out of the vaults even with the express consent of the Directors if the act had been permitted on account of the credit given to the Fidelity by the Chemical.

When Harper told the bookkeeper to credit him with $300,000 and charge the same amount to the Chemical (Rec., p. 64) he was asking the true legal effect to be given to his fraudulent act. Having borrowed the money for the Fidelity without authority it was a loan to himself. If he had been in New York to receive the money and had decamped with it, the Chemical after discovering the fraud would no doubt

have changed the credit from the Fidelity's account to the individual account of Harper. At least, that is what it ought to have done. But Harper was not there. He therefore asked to have the money, which had in legal effect been loaned to him, to be credited to the Fidelity which was done. This fraudulent act against the Chemical completed enabled him to draw the money from the Fidelity. The effect was the same as if he had stolen the money from any third bank and deposited it in the Chemical with one hand, taking it out of the Fidelity with the other.

II.

The next error complained of relates to the manner of crediting the proceeds of collaterals.

Of the paper sent by Harper as collateral security for the loan, a small portion only was the property of the Fidelity Bank (Rec., p. 66, Q. 35). The residue was the property of Harper.

The bill of complaint admits that the sum of $75,000 had been realized from the notes of J. W. Wilshire, part of the collaterals which the testimony above referred to shows belonged to Harper. This amount had been paid prior to the proof of claim, as appears by the copy of proof (Rec., p. 90).

After suit was brought, but before defendant's amended answer was filed, the further sum of $20,469.29 was realized from the paper of The Champion Machine Co. and bonds, which part of the collaterals belonged to the Fidelity Bank, as shown by the above testimony. (Rec., p. 66, Q. 35, and p. 76.)

Three questions are therefore presented by the record:

First, shall the creditor be required to exhaust his collat-

eral security and credit the proceeds on his claim, or to surrender his collateral, before proving his claim?

Secondly, shall he be required at least to deduct from his claim the proceeds of collateral received before proving his claim?

Thirdly, shall the proceeds of collateral received after proof of claim, but before dividends are paid, be deducted from the amount of his claim as proved and dividends be paid on the balance only?

Before discussing generally the principles that govern the application of collaterals to claims against insolvent estates, we desire to call the Court's attention to one feature of this case that renders it specially inequitable that dividends should be paid on the entire claim.

Harper, having borrowed this money for his individual purposes, is, as between himself and the Fidelity Bank, the *principal* debtor. The $75,000 received before proof of claim was his money—the proceeds of notes that belonged to him. Now, if the bank is to be held liable on the ground of some custom established by the New York banks, or negligence in its own Directors, or some principle of estoppel, we submit that it ought to have credit for that portion of the loan repaid by the proceeds of Harper's collaterals.

The section of the statute of the United States in reference to National Banks which regulates the payment of dividends is 5236 R. S., and reads as follows:

"From time to time, after full provision has first been made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction, and as the proceeds of the assets of such associ-

ation are paid over to him shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

The provisions are that the dividends shall be "ratable" of the money paid over to the comptroller by the receiver, and shall be "on all such claims as may have been proven to his satisfaction or adjudicated in a court of competent jurisdiction." The dividends must be ratable, *i. e.*, proportionate, according as the amount of each claim is to the amount to be divided. Again, it is to be on all such *claims* as have been proven or adjudicated. It must be a claim, *i. e.*, a debt. It must be proved to the satisfaction of the comptroller; or if he rejects it, it must be adjudicated in a court of competent jurisdiction. A claim as used in the statute is synonymous with indebtedness or liability.

In the language of Chief Justice Waite, in *Waite* v. *Knox*, 111 U. S. 784.

"All creditors are to be treated alike. The claim against the bank, therefore, must necessarily be made the basis of the apportionment."

The claim must be proved to the satisfaction of the comptroller. It must be supported by affidavit that the amount is actually due, that is claimed. If rejected by the comptroller, it must be adjudicated in a court of competent jurisdiction. This can be done by a suit against the insolvent bank, if still in being.

"A receiver's decision upon the validity of a claim presented to him for a dividend is not final. A creditor may proceed against the bank in the proper State Court to have the validity of his claim judicially determined."

N. Bank of Bethel v. *Pahquioke Bank*, 14 Wall. 383.

The suit may be brought against the receiver, as in the present case, to compel the allowance of a claim; but whether it is brought against the bank itself or the receiver, the question before the Court is the same, to determine judicially the validity of the claim. The amount of the claim is as much a part of its validity as any other question in the case. How much, if anything, does the insolvent bank owe to the plaintiff in the case, is the question to be determined.

The amount of the claim is not affected by the solvency or insolvency of the bank. Suppose the Fidelity Bank had not failed, and a controversy had arisen between it and the Chemical in reference to this loan, and the Chemical Bank had brought suit against the Fidelity to recover the amount of that loan, after the former had made collections on the collaterals held by it for its security, could there be any question that it could only have recovered a judgment for the amount of the loan after crediting the payments made to it up to that time from the collections of collateral? And why? Simply because that was the amount then due. That was the claim then legally existing. The claim is no larger because the Fidelity Bank has become insolvent. The claim is still the amount actually due; that is what must be proved or allowed, or judicially adjudicated by a court of competent jurisdiction.

In re Pulsifer, 14 Fed. Rep. 247,
Justice Blodgett says, as to the amount of the claim to be allowed,

"The same rule must apply in the case as would hold if a suit at law had been brought by the bank against the bankrupt as endorser of this paper."

This decision was not based on the provisions of the Bankrupt Act.

But it is claimed that there is a fixed date when the amount due is determined, and that the amount then due remains the amount on which dividends are to be paid, whatever changes may occur, and that this date is that of the suspension of the bank.

The case of *White* v. *Knox*, 111 U. S. 784, is referred to as sustaining this position. The question before the Court in that case was as to the date to which interest on claims should be calculated. The Court held that interest should be calculated on all claims to one date, and as no new debt could be contracted after the suspension of the bank, that was a convenient date to fix for that purpose. As interest on all other claims had been calculated to that date, the plaintiff in the action pending before the Court must be governed by the same rule. The object was, as stated by Chief Justice Waite, "that all creditors might be treated alike." This was accomplished by fixing a time to which interest on all claims should be calculated. It was immaterial what time that should be, so that it was the same to all. The Court had adopted the day on which the bank suspended payment, and for the reason given above, that action was approved. To use that date for the purpose claimed in this case, would reverse the result aimed at in the decision. It would not treat all creditors alike, but permit those to whom payments were made after that time to have an advantage over those to whom payments were made before that time.

The cases of *National Bank* vs. *Colby*, 29 Wall. 609, and of *Scott* vs. *Armstrong*, 146 U. S. 409, are also cited on this point.

Those cases do name a date when certain rights become fixed. But unfortunately for the argument it is not the date claimed in this case. In the first case it is declared that all transfers by an insolvent bank, and all payments of money

made after an act of insolvency, or in contemplation thereof, with a view to a preference of one creditor over another, shall be utterly null and void. The object is stated to be to secure equality among the creditors.

In *Scott* vs. *Armstrong*, the court says that the right of the party becomes fixed as to certain matters, as of the date of the act of insolvency. This date may be some time before the closing of the bank by the comptroller.

The case of *Eastern Township Bank* vs. *Vermont National Bank*, 22 Fed. Rep. 186, was also upon the question as to the date of calculating interest. And in this case a still different date is named, that of the appointment of the receiver; showing that there is no fixed time determining the rights of the parties as to interest, only such convenient time as applies to all alike and will equalize their claims.

In those cases where the date is fixed by the statutes regulating national banks, it applies only to transfers of property or payments of money, with intent to create a preference. It has no reference to fixing a date when the amounts of claims against the bank shall be irrevocably fixed. The object is stated to be to secure equality among the creditors, and not to enable one to secure an advantage over another.

Let us illustrate the result of the claim made in this case. Suppose a creditor's claims against an insolvent bank should be founded on an endorsement of bills receivable discounted for it. At the date of the closing of the bank this paper is not due, or if due has not been paid. The claim at that time would be the full amount of the paper. Suppose afterwards the makers of the paper should pay part of it. Would the creditor still be permitted to prove and collect dividends upon the entire claim? Or, if this is not granted, suppose the claim is made up of endorsements upon a number of bills receivable, none of which were paid at the date of the

suspension of the bank, and after that date one of such bills should be paid by the maker in full. Would the creditor be permitted to still prove and collect dividends against the endorser upon the whole amount of the bills receivable unpaid at the date of the suspension? On the principle claimed by the plaintiff in this case, he could. But the fixing of a date in the cases cited, and in the statute, seems to be for the purpose of equalizing the rights of all the creditors in the assets. The claim made in this case defeats that intent.

When a creditor is required to prove his claim; to verify it to the satisfaction of the comptroller, or to adjudicate it in court, the natural conclusion is that the claim must be one then existing and for the amount existing at the date of the proving or adjudication. No other time for that purpose is named in the statute.

The argument of counsel that

"As the demand of the statute that claims should be equalized for dividend purposes as they stood at the declaration of insolvency requires the creditor to ignore temporarily all additions to the claim since that day by way of interest, so on the other hand, equal justice requires that he should be permitted to ignore temporarily all deductions from the claim since that day by way of credits," is wholly fallacious. The equalizing at a certain date in the matter of interest, is wholly a matter of convenience and takes nothing from the creditor. Were interest calculated on all claims, to the date of dividend and the assets then divided pro rata, each creditor would receive the same amount as if the interest were calculated to the date of suspension. But if the creditor is permitted to receive payments after any date without deducting them, he obtains an advantage over all other creditors.

We contend, therefore, that according to the proper construction of the national banking act a dividend is payable

only upon the amount actually due: upon the amount for which a judgment would be rendered if suit be brought against the bankrupt: that the insolvency of the bank, if it takes no rights from the creditor, adds none to his claim; and that the doctrine that a particular time is established at which all claims must be valued, applies only to matters in which all are interested alike, and not to matters such as payments on particular claims, and is established in the interest of equality among the creditors, and not to destroy equality.

The next question to be considered is whether aside from the provisions of the national banking act, the complainant is entitled to prove its original claim without reference to the payments made on that claim from collaterals collected.

It is admitted that upon this question the decisions of the courts have not been uniform. Some have held that the creditor must exhaust his collaterals, and prove only for the amount of the indebtedness after crediting the value of the collaterals. Others, that he may prove for the entire amount of his claim without reference to the collaterals held by him. The uniform course of legislation, both in England and in this country, providing for the settlement of bankrupt estates, has adopted the first of these modes of settlement. It is true that during the life or the solvency of the debtor, a creditor holding collateral may sue his debtor upon the principal debt without reference to any collateral that he may hold. Giving collateral is unquestionably not payment of the debt. This right seems to be the basis of all the decisions sustaining the claim made by the complainant in this case. It is said that death or insolvency ought not to divest a creditor of any right which he might have exercised prior thereto. No such claim is necessary to sustain the decree of the court below. It is only necessary to claim that the

same rule shall apply to an insolvent as to a solvent debtor. In the case of the latter he may be sued for the entire debt; but the creditor must use due diligence to collect the collateral, and is liable to his debtor if he fail to do so. The payment of collateral in such a case invariably reduces the amount of the debt. And after any such payment has been made no greater amount can be found due than the amount of the debt so reduced by the payments on the collateral. Must not the same rule apply to an insolvent debtor?

Again, Chief Justice Waite holds that all creditors must be treated alike. Suppose, by way of illustration, two creditors hold against an insolvent debtor a claim of one thousand dollars each. One holds collateral of the value of five hundred dollars; the other none. The first is, therefore, a secured creditor in the sum of five hundred dollars and an unsecured one in the sum of five hundred dollars. The second one is an unsecured creditor for one thousand dollars. The assets of the insolvent debtor pay a dividend of fifty per cent. The result will be on the claim made by the complainant in this case, that the first creditor will have his unsecured debt paid in full, while the second creditor will receive a dividend only.

Again, two creditors hold collateral of a like character. One receives payment from the collateral held by him the day before the bank closes. He must credit that collateral and sue for the balance. The other receives payment the day after such suspension, and yet according to the claim of appellant, he may prove for the full amount of the original claim. This is not making the creditors equal.

The whole history of legislation in reference to insolvent estates shows a universal sentiment as to the justice of the claim made by the defendant. We believe that every Bankrupt Act of Great Britain, of the United States, and of the

separate States, recognizes and adopts this principle of distribution in bankrupt estates. The fact that the rule was not only adopted, but has been continued from time to time until now, is the strongest evidence of its justice and equality among creditors that can be imagined.

Section 5075 R. S. U. S. provides as follows:

"Section 5075. When a creditor has a mortgage or bill or pledge of personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct. Or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt."

And similar provisions were enacted in previous statutes, and also in the Bankrupt Act of 1898. After such a recognition of the Rule it is scarcely necessary to argue as to its justice and equality to a court of the United States. It is true that the national banking act does not contain a similar provision. Indeed, it contains no details or direction as to the manner in which distribution shall be made except as quoted before. But at the date of the passage of that act, the bankrupt act was in full operation; and it would be strange indeed if Congress did not intend that the same rule should apply to all insolvent estates within its jurisdiction, whether of individual bankrupts or of insolvent national banks.

Nor is the argument of complainant's counsel as to the inconvenience of the rule sound. The rule has been in force in all the bankruptcy cases in England and this country without inconvenience or injustice to any creditor. Even if a new calculation of interest were required on the payment of each

dividend, it would be better than to do such injustice to creditors as is claimed in this case. But no such calculation of interest is necessary. All that is necessary is to re-state the claims of such creditors as have received partial payments. This is always done in the case of solvent debtors, and may with equal ease be applied to insolvent ones.

What was the duty and liability of the Chemical National Bank in reference to the collaterals sent to it by Harper? The collaterals consisted entirely of promissory notes of different parties.

Schouler of Bailments, p. 213, says:

"On this latter point" (speaking of the pledge of bills receivable as collaterals) "the rule deducible from the number of late decisions is that the pledgee of negotiable securities not only has the right, but is bound in the exercise of ordinary diligence to make presentment for collection on their maturity, and then apply the proceeds on the pledged account."

And on page 192, speaking of the duty of the holder of bills left as collateral, he says he must "Collect it, and apply the proceeds to the principal debt."

And in *Wheeler* vs. *Newbould* 16 N. Y., 398, the court, speaking of the duty of the creditor, in this case the Chemical National Bank, in reference to the collaterals held by it, says:

"It will rather presume that it was the intention of the parties to the contract that the creditor should, if he resorted to the pledge in place of the personal liability of the debtor, accept the money upon the hypothecated security as it became due and payable, and *apply it to the satisfaction of the debt.*"

There are many other authorities to the same effect. It was, therefore, the duty of the Chemical National Bank to

collect the collateral paper as it matured, and to apply whatever it received to the satisfaction *pro tanto* of the debt as security for which it was given. This duty was not changed by the insolvency of the Fidelity National Bank. Its obligation to collect and apply continued the same. The effect of payments received from collaterals remained the same. Such payments should be applied to the satisfaction of the debt afterwards, as before.

Let us now look at the decisions of the courts on this question.

Three English cases have been cited by the counsel for the complainant, and as we think they fairly state the result of English authorities, we will confine our argument to them.

They are:

Greenwood vs. *Taylor*, 1 Russ. & Myl., 185.
Mason vs. *Boggs*, 2 Myl. & Cr., 443.
Kellock's case. } Law Reports, Chy.
In re Xeres Wine Shipping Co., } Appeals, vol. 3, 779.

The first case sustained the entire claim as made by the appellant in this case. The second doubted the correctness of that decision, but finally failed to overrule it. The third sustains the position taken by Judge Sage, that collaterals realized before proof of claim only, should be deducted.

In *Greenwood* vs. *Taylor*, the Master of the Rolls says:

"The rule in bankruptcy must be applied here; and the mortgagee can not be permitted to prove for the full amount of his debt, but only for so much as the mortgaged estate will not extend to pay. This rule is not founded, as has been argued, upon the peculiar jurisdiction in bankruptcy, but rests upon the general principles of a court of equity in the

administration of assets. The mortgagee who has two funds as against the other specialty creditors who have but one fund, must resort first to the mortgaged security, and can claim against the common fund only what the mortgaged estate is deficient to pay."

If this case is followed, the defendant is entitled to have all payments credited on the debt whether made before or after proof of claim, and on subsequent dividends to have the debt revalued by crediting payments made since the former dividend.

In *Mason* v. *Boggs*, the Lord Chancellor remarks:

"I can not distinguish this case from *Greenwood* v. *Taylor*. But with respect to the principle of that case, it is to be observed that the mortgagee has a double security. He has the right to proceed against both and to make the most he can of both. Why he should be deprived of this right because the debtor dies, and dies insolvent, it is not very easy to see. * * * What you contend is that the creditor can not proceed to enforce his legal rights unless he gives up his security."

And on page 447:

"In equity, however, a party may come in and prove without giving up or affecting his security, except so far as the amount of his debt may be diminished by what he may receive."

This last expression would indicate that a payment would reduce the amount of the debt, and that therefore if made before proving the claim it should be deducted.

In both of these cases the creditors held mortgages securing their debts. These mortgages had not in either case been foreclosed or paid; and the sole question was as to the right of the creditors to proceed to enforce both the mortgage and the indebtedness.

The third case arose under the winding up provisions of the Company's acts of 1862. In Kellock's case, Kellock & Co. held accommodation acceptances of Bernard's Banking Company for £31,264, secured by a lien on certain vessels against which the bills were drawn. A winding up order was issued May 8, 1866, and in June, 1866, Kellock & Co. sent in their claim to the official liquidators. In 1867 they realized on part of their securities £9,916. The claim was afterwards disputed, and the hearing upon the exceptions took place after the above sum had been realized.

In the Xeres Wine Shipping Co. case, the Alliance Bank had a claim secured by a lien on wine partly in its possession, and partly in the possession of the Xeres Wine Shipping Co. The winding up order was issued in December, 1864, and on March 2, 1865, the creditor sent in its claim to the official liquidators, crediting £85 realized between the date of the winding up order, and the sending in of the claim. The case was first heard by the Vice-Chancellor, Sir A. R. Mallins, and was decided in the following language:

"The winding up is a *quasi* bankruptcy. The official liquidator takes possession of all the assets of the company. He realizes them under the 133rd section, and distributes them ratably, or *pari passu* among the creditors, but over and above the assets calls may be made on the shareholders. On these grounds I am of opinion that the rules in bankruptcy are applicable; and therefore, that every creditor having a security must realize the security and come in as a general creditor for the balance due to him after such realization. The winding up order was made in 1864, and in 1865 the bank realizes their securities, and now, in 1868, they ask me to admit them to stand as creditors for the whole amount of their original debt. Now, if the official liquidator had given them a check for the amount they realized on their security the Company would not then have thought of con-

tending that they should stand as creditors for the whole amount of their original claim, and they have nó higher claim to stand for the whole amount because they realized their security instead of being paid by the official liquidator.

I must, therefore, come to the conclusion that the bank must be admitted as creditors for the balance which remains due to them after realizing the securites held by them, and for that amount only."

On appeal this decision was reversed, but in deciding the case the Court says:

"There remains the question as to the time with reference to which the amount proven is to be ascertained. And as to this there is a little more difficulty. I think, however, that the true rule is that the debt is to be taken as it stands at the time when the claim is put in. The 20th Rule of the General Order under the Act of 1863 directs an advertisement fixing a time for the creditors to send the particulars of their debts or claims to the official liquidator, and appointing a day for the adjudication thereon. The Court, therefore, is to adjudicate upon the debt or claim so sent in, and the adjudication at whatever time it may take place must be on that debt or claim, and I apprehend the only way of adjudicating on it must be to adjudicate on what was due when the debt or claim was sent in."

And Chief Justice Seldon, on page 783, says:

"If we look at the practice established by the General Order, it is entirely within the discretion of the judge to fix the time within which the creditors are to send in the particulars of their debts or claims. Of course, until that time, the debt can not be established. * * * I think, therefore, that the balance of convenience and inconvenience incline strongly to the view which my learned brother has expressed, which is, that the debt is to be taken as it stood when the creditor put in his claim."

From this decision it is clear that the sending in of the claim was the equivalent to proving the claim under the national banking act. The winding up order was the date when the assets were taken possession of by the official liquidator. It had the same effect as the closing of the bank by the comptroller. Notice was then given to send in claims against the company. And the court in making that order had the right to fix any future time which it might think proper within which claims were to be presented. No affidavit to the claim was necessary. The creditor presented and filed the claim with the liquidator the same as creditors file their claims with the receiver, and it is the date when the claim is presented and filed under this order when, according to the court in this case, the amount due is fixed. All payments made prior to that time must be credited. And so in the case now on hearing, all payments made prior to the proving of the claim and filing it with the receiver must, according to this decision, be credited on the debt, and reduce the amount due.

The result, then, of the English cases, is a decision in the *Greenwood* vs. *Taylor* case, and by the lower court in Kellock's case, in favor of the claim made by the defendant on the appeal; of the upper court in Kellock's case in favor of the decision of Judge Sage throughout; and in *Mason* vs. *Boggs*, an expression of opinion without any decision.

We submit that the weight of authority in England is strongly against the claim of the complainant.

When we examine the decisions of the different courts of the United States, I think that we will find the result to be similar to that shown in the English courts.

In the case of *Amory* v. *Francis*, Administrator, 16 Mass. 309, the Court holds as follows:

"If the creditor of an insolvent estate has a mortgage as

security for his debt of less value than the amount of his debt, he can claim from the commissioners only for the difference between his debt and the value of the property mortgaged."

Judge Parker, on page 311, says:

"Were it otherwise, the equality intended to be produced by the Bankrupt Law would be grossly violated, and 'The rules were adopted in England on account of their reasonableness and because consistent with the nature of the contract.' and 'There seems to be no reason why the same rule should not be applied to the settlement of deceased insolvent debtors in this commonwealth, for the Statute which provides for a distribution of these among creditors requires an equal pro rata distribution, and it never could have been intended by the Legislature that a creditor having security should have an advantage beyond the actual value of the property mortgaged. If the creditor had taken possession of the mortgaged premises, and foreclosed the mortgage, he would have the right to consider the estate a payment *pro tanto* according to its value, and file his claim before the Commissioner for the balance, as it has been settled in several cases.'"

And in *Farnum, et al.*, vs. *Boutelle*, 54 Mass. (13 Mett.) 159, Chief Justice Shaw, on page 164, held:

"For if the mortgage remained in force at the time of the decease of the debtor, then it is very clear, as well upon principle as authority, that the creditors can not prove their debts without first waiving their mortgage, or in some mode applying the amount thereof to the reduction of the debt, and then proving only for the balance."

And in *Sohier* vs. *Loring, et al.*, 60 Mass. (6 Cush.) 537, it is held:

"The holder of a bill of exchange, no part of which has been paid, may prove it in full in insolvency against the estate of each party thereto, and receive a dividend from each upon his whole claim, provided he does not receive in all

more than the whole amount of the bill. But any proof sought to be made after he has been paid any part of his claim, can be only for the unpaid balance."

On page 548 the Court says:

"But there is a distinction in this case where a holder applies to prove his debt against one party after having received a part of it from another; and when he applies to prove before receiving any payment or composition from another party, or before a dividend has been declared in his favor under a commission against another party. Any sum actually received in payment from any party to a bill before proof made against another must be deducted from the amount to be proved against any other party."

And in a still later case in the same state, the *Merchants National Bank* vs. *Eastern Railroad Company*, 124 Mass., 524, decided in 1878, the court says:

"The certificate as a payment must, therefore, represent the actual debt reduced by the value of the collateral security. This result conforms to the rule of equality which the statute plainly recognizes as existing between all the creditors. It is supported by the consideration that it is the rule in bankruptcy, the rule applied in this commonwealth to the settlement of the insolvent estates of deceased persons; and the rule in equity which requires a creditor who has two funds for the payment of his debt as against the other creditors who have but one, to resort first to his own security, and permits him to claim against the common fund only to the extent that the security which he holds falls short."

It is claimed that the Massachusetts decisions here cited (and there are several others in the same State to the same effect) are based on the Bankrupt Law of that State, and that, therefore, they ought not to apply to a case in equity. Those decisions, however, are not in cases of bankruptcy at all. But they are based upon what the Court regards as equity as ap-

plied to the settlement of estates of deceased persons, and other insolvent estates not in bankruptcy. The Courts do hold that the provisions of the Bankrupt Law are in accordance with the intention of the act to distribute the assets of deceased insolvents ratably among all the creditors; and the same rule should apply to the Courts of the United States, for the Statutes of the United States have adopted the same provisions in the National Bankrupt Act as Massachusetts did in its State Bankrupt Act. The eminent Judges who delivered the opinions referred to believed that such decisions were in accordance with the rule for distribution of assets, to which we have referred, and their opinions upon that subject are entitled to weight in all courts.

In the case Wurtz vs. Hart, 13 Iowa, 515, the Supreme Court of Iowa held:

"A creditor under a general assignment who has special security may be required by the other creditors to resort to this, and can only claim a dividend upon the amount remaining unpaid after exhausting the property upon which he takes a special lien."

The counsel for the appellant refers to this case as being decided without much consideration; but it never has been departed from in a decision of that State, and in the recent case of Doolittle vs. Smith, decided by the Supreme Court of Iowa on January 21, 1898, was expressly affirmed (73 N. W. Rep., 867). In the latter case a creditor, after proving her claim against an assignee for the benefit of creditors, realized a large sum from her collaterals. The Court required her to credit the amount and received dividends on the balance only.

In *Midgeley* vs. *Slocum*, 32 Howard's Practice Rep., 423, it was held:

"Where a bank, a creditor holding notes belonging to

the class mentioned in the assignment to a large amount, which were secured in part by a pledge of notes by other parties, which other notes had been collected by the bank, held that the law applied these collections to the payment of the principal debt, so that the bank had ceased to be a holder of the notes thus paid, and was not entitled to a dividend on the basis of the original indebtedness."

And in Knowles, Petitioner, 13 R. I., 90, the Supreme Court of Rhode Island held:

"In Rhode Island a creditor who has a claim secured by a lien, is entitled to a dividend from the voluntary assignment of his debtor only on such residue of his claims as may remain unpaid after he has exhausted the property subject to the lien."

In this case the Court refers to the various decisions of the courts upon this question, and concludes by saying that it preferred the doctrine of the cases in which it has been decided as thus held by that court, and says, further:

"It also accords with the policy of our present Statute that creditors shall share equally in proportion to their respective demands in the assets of their debtor. We are of the opinion, therefore, that the proceeds of the mortgaged property are to be first applied to the payment of the notes, and the dividend paid upon the residue only."

It is true, as stated in the Brief of Appellee, that the same court in 15th R. I. has decided this question in a different way, and that, therefore, the Supreme Court of that State may be counted on both sides of the question. We give this decision simply as the argument of the Judges who composed the court at that time in favor of the doctrine which we claim is equitable.

In re Souther, 2 Low., 320, Justice Lowell says:

"The general rule undoubtedly is that the holder of a

note may prove against all the parties for the full amount, and receive dividends from all until he has obtained the whole of his debt with interest. It is likewise the general rule that what he has received from one party, or from dividends from one party in bankruptcy from the note, are payments which he must give credit for if he afterwards prove against others."

And, again, on page 321:

"The theory of this decision is that no creditor can prove for more than his actual debt as it exists at the time of the proof, without obtaining an undue advantage over other creditors."

In re Pulsifer, 14 Fed. Rep. 247, it is held:

"A creditor has no right to prove his debt and receive dividends on any more than the actual amount of the bankrupt's liability. So a bankrupt endorser is liable only for the balance due on notes endorsed by him after deducting the amount paid by the maker of the note."

And on page 249 the Court says:

"The same rule must apply in a case as would hold if a suit at law had been brought by the bank against the bankrupt as endorsers of his paper."

So in the present case, the Chemical National Bank has the right to prove for the exact sum, and no more, that it could have recovered judgment for in a suit at law brought by it against the Fidelity National Bank at the time when the offer to prove was made.

See, also, ex parte Harris, et al., 14 Nat. Bk. Register, 422.

A very strong case is that of *The Third National Bank of Baltimore* vs. *Lanahan, Trustee, et al.*, decided January 5, 1887, and reported in 66 Md. 461 (7 Atlantic Rep. 615).

The syllabus is:

"Under an assignment for the benefit of creditors, the obligation of the Trustee to pay a debt owing by the assignor does not depend on the state of the account between the creditor and the assignor at the time of the assignment, but at the time when payment is made."

"Where at the time of the assignment a debt of the assignor is secured by collaterals and is subsequently partly paid to the creditor by moneys realized from the collaterals, before a dividend on the debtor's estate is made, such creditor is not entitled to a dividend on the full amount of the indebtedness, but only on that portion which remains after deducting the amount received from the collaterals."

The facts were, R. W. Raisin and W. L. Raisin, general partners as W. L. Raisin & Company, made a general assignment for the benefit of their creditors, both individual and partnership. The assignment embraced all the property of the firm, and all the separate property of each partner. The Third National Bank was a creditor of the firm. A portion of this indebtedness arose in this way: S. K. Cooper, known as a special partner of the firm, executed five promissory notes of $5,000.00 each, payable to the order of R. W. Raisin & Company. These notes were secured by the pledge of certain other notes belonging to the partnership and which were owned by its debtors. They were delivered to the bank together with the collateral security, and by it discounted after they had been endorsed in the firm name. * * * Before the filing of the claim it had collected a large sum from the collaterals pledged to secure the discounted notes.

Judge Bryan held:

"Where an assignment is made under a trust deed directing the trustees to pay all the creditors in full, if the assets are sufficient, and if not, then ratably and equally according

to their respective amounts, a creditor, being a bank with whom notes due the debtor were deposited as collateral to obtain advances on his notes, and which has largely realized on the collateral, can not claim a dividend on its whole debt without deducting the amount realized on the collaterals."

And, again:

"Before the filing of the claim, it (the bank) had collected a large sum from the collaterals pledged to secure the notes. It contends that it is entitled to a dividend on the full amount of the indebtedness, without deducting the sum received from the collaterals. * * * The trustee is required to pay all the partnership creditors in full, if the partnership assets are sufficient; and if not, then ratably and equally according to their respective accounts. It can not be denied that the sum received from the collaterals diminished the indebtedness of the partnership. We do not see how any question in respect to the marshaling of the assets can arise. It is simply a question where a portion of a debt is paid by property of the debtor pledged to secure its payment. It is not a question whether other creditors can compel the bank to seek payment from the collaterals before claiming distribution from the trust fund. The bank has actually received payment to a certain extent. The portion remaining unpaid is an ordinary debt reduced to judgment."

The counsel for appellee speak of this case as decided upon the peculiar terms of the trust deed made in that case. But those "peculiar terms," as they call them, were simply the same as the statutes regulating the distribution of the assets of insolvent National Banks apply to such assets. It was that they should be divided ratably and equally. No other condition applied to the mode of distribution, and so the assets of insolvent National Banks are to be distributed equally and ratably among the creditors. And the court, in deciding the case refers to the various decisions cited in the

present case, and gives its judgment as its conclusion from those decisions.

The same court in the recent case of Nat'l Union Bank of Maryland vs. Mechanics' Bank of Baltimore, 80 Md. 371, not only approve as "just and equitable" the rule that distribution should be made on the basis of the amount then due, but require the secured creditor to exhaust or deduct the value of his security before proving his claim. It was a case of an assignment for the benefit of creditors, and much stress is laid on the inconvenience of permitting the secured creditor to participate for the full amount of his claim in the assets and afterwards to collect the full amount of his collateral, with all the risk of his own insolvency when called upon by the assignee, from whom he has received dividends, to refund the excess above full payment.

Another strong authority is the case of Wheat vs. Dingle, 32 S. C. 473, decided April 10, 1890. The syllabus is as follows:

"Where lien creditors of an intestate receive part payments after his death from the proceeds of property mortgaged and pledged, they are entitled to dividends along with the unsecured creditors out of the general assets, but only upon the amount of their demands remaining unpaid after such application, and not upon the amount due at the date of the intestate's death."

After referring to the case of *Morton* vs. *Caldwell*, and stating the questions decided in that case, the Court says:

"This seems to us, considering the facts, strictly correct; but suppose the payments referred to instead of having been made by a third party had been out of the estate proper of the debtor himself, would it be for a moment contended that such payment did not release that much of the amount for which the deceased was originally liable to the creditor? It

seems to us that such result would not only be in violation of all principles but entirely unjust. * * * After the property mortgaged has been sold and applied to the debt, leaving a balance of the debt unpaid as to that balance, the creditor is no longer a mortgage creditor, but stands only where his evidence of indebtedness is, and he gets judgment for the balance alone on his claim whatever it may be from which has already been eliminated what was a mortgage debt."

This case most clearly disposes of the claim that the amount due at the intestate's death, or at the date of the assignment is the only amount upon which dividends must be paid, and that payments made after such dates can not be considered in distribution. This claim is the one which the counsel mainly argued as settled by the case of *Morton vs. Caldwell.*

A recent case in the same state, Ragsdale vs. The Winnsboro Bank, 45 S. C. 575, makes a distinction between payments from a principal's estate, after proof filed against both insolvent principal's and surety's estates, and payments from securities that came from the debtor's estate. The court approves the ruling in Wheat vs. Dingle, but shows the very just and equitable distinction between a rule that permits full dividends on the whole amount due when there are *two distinct debtors* (even though principal and surety) and a rule that permits such dividends when the creditor has received part payment out of the debtor's assets held by the creditor as security. The court say, p. 583 (italics ours): "We understand that the exceptions to so much of his Honor's decree as decided that creditors who hold collateral securities should be paid their *pro rata* dividend, regardless of the amounts they may have collected, or may yet collect, on said collaterals, has been abandoned. *This court, however, does not desire it to be understood that it assents to this rule of distribution.*"

The Supreme Court of Washington, on December 9, 1892, decided the case *in re Frash*, which is reported in 5 Wash. 344, and from which we make the following quotation:

"Section 8 of the Act provides that the assignee shall, from time to time, make full and equal dividends among the creditors of the assets in his hands in proportion to their claims, not a dividend in proportion to their claims, simply, but a full and equal dividend. It is for this purpose that the assets are marshaled and placed under the control of the Court, that if a creditor comes in to prove his claim he must come in upon equal footing with creditors of a like class. As we have before said, if a creditor were allowed payments on his whole original claim, he would have greater advantages than the original security contemplated, for as was well said in *Amory* vs. *Francis*, 16 Mass. 308, 'originally it would only have been security for a proportion of the debt equal to its value, whereas by proving the whole debt, and holding the pledge for the balance, it becomes a security for as much more than its value as is the dividend which may be received upon the whole debt.' We think that the plain and universally recognized principles of equity demand that the secured creditor must first exhaust his security, apply the proceeds to the diminution of his claim, and then share *pro rata* with other unsecured creditors on the balance of his claim. Such is the holding of the Iowa cases under a statute identical with ours. See *Wurtz* vs. *Hart*, 13 Iowa, 515. Such also is the holding of the courts of South Carolina, Louisiana, Vermont, Maryland, and Massachusetts. Some of the Massachusetts cases, but not all, are decided on the strength of their Statutes in Bankruptcy."

In many of the cases cited reference has been made to the Rule in Equity regulating the marshaling of securities. We quote this Rule as laid down in Story's Equity Jurisprudence, section 633:

"The general principle is that if one party has a lien on,

or interest in, two funds for a debt, and another party has a lien on, or interest in, one only of the funds for another debt, the latter has a right in equity to compel the former to resort to the other fund in the first instance for satisfaction if that course is necessary for the satisfaction of the claims of both parties, whenever it will not trench upon the right or operate to the prejudice of the party entitled to the double fund. Thus a mortgagee who has two funds as against the other specialty creditor who has but one fund, will in the case of the death of the mortgagor, and the administration of his assets be compelled to resort first to the mortgage security, and will be allowed to claim against the common fund only what the mortgage on a sale consented to by him is deficient to pay."

This most equitable rule is applicable to the facts of the present case, and gives to each class of creditors a fair and equal share of the assets of the insolvent estate.

In Bell v. Fleming's Executors, 1 Beasley 13, Chancellor Williamson approves the rule, as a general one in claims against insolvent estates, that the creditor should be first compelled to exhaust his security before being allowed to participate in dividends, and should draw dividends only on the balance due him. He bases the rule on the broad ground that equality is equity.

Willis v. Holland, 36 S. W. 329, was a case where an insolvent debtor had made a conveyance to a trustee in trust to pay certain of his debts. The Court says, p. 331, that such creditors have a right to have security held by one applied to his debt before he will be allowed to participate. It must be inferred that participation would be only upon the balance.

In Field's Ex'r. v. Creditors of Wheatley, 1 Snead 351, and Winton v. Eldridge, 3 Head 361, it is held that mortgage creditors of a decedent must first exhaust the mortgage,

and for balance share *pro rata* with other creditors in the personalty.

The same just principle of distribution is approved in two recent cases in Kansas.

> The American National Bank v. Branch, 57 Kans. 27.
> The Security Investment Co. v. Richmond National Bank, 58 Kans. 414.

In both cases the question arose under assignments for the benefit of creditors. In The American National Bank vs. Branch, 57 Kans. 27, the Court say, p. 35: "It would be inequitable to allow these claimants a *pro rata* dividend on the whole amount of their claims when payment of a part, if not all, of it may be received from the mortgage securities to which they have the exclusive right."

In The Security Investment Co. vs. The Richmond National Bank, 58 Kans. 414, the Court say, pp. 417, 418: "As the claimants held liens on property other than that assigned, they were not entitled to share equally in dividends with those who held no special security."

In Moore vs. Dunn's Adm'r, 92 N. C. 63, it is held that a mortgage creditor of a decedent must first exhaust his mortgage and look to the personalty for the residue. The case follows and approves Creecy vs. Pearce, 69 N. C. 67, where it is expressly held that the residue, after exhausting the mortgage, is to be paid ratably with other claims.

Some of the authorities do not require the creditor to exhaust his security before participating in dividends, but if he realizes anything from the securities it must be deducted from his claim whensoever received, and dividends paid only on the balance.

In Lowell vs. French, 54 Vt. 193, the creditor had proved for the full amount against the estate of both principal and

surety. A dividend having been afterwards paid from the principal's estate, the creditor was required to deduct it and share only upon the balance in the surety's estate. The Court say, p. 199 (italics ours): "In the distribution of an insolvent estate we see no reason why a payment made by the principal after the allowance should not be treated in the same way that it would have been if made before. In both cases the payment reduces the liability of the estate. While it is true that the payees had the right to regard the surety as a principal, and to enforce his liability as a principal until they had obtained full satisfaction, yet *where there is only a limited fund from which to obtain satisfaction, and the question is made how that fund shall be distributed, creditors whose claims are equal in right are entitled to share equally in such distribution.*"

The case of Bank vs. Alexander, 85 N. C. 352, is very similar to Lowell vs. French. It is not clear from the report whether a dividend was received from the principal's estate before proof against the surety's estate or before dividend. It was received after *insolvency* of both principal and indorser, and the Court required it to be deducted from the claim against the surety's estate.

Wheeler vs. Walton & Whann Co., 72 Fed. 966, was a decision by the Circuit Court of the United States for the District of Delaware. Judge Wales pronounced the opinion. It was a receivership case, which is virtually the same, as the court say, so far as the rule for application of collateral is concerned, as a case of assignment for the benefit of creditors. On page 967 Judge Wales says that by collecting the collateral notes before a dividend is made the creditor must credit the amount received and take a dividend on the balance only. The conflict of authorities is recognized, but in a note by the reporter it is said the court's attention was

not called to the case of Levy v. The Chicago National Bank, 158 Ill. 88, hereinafter cited.

In re Estate of McCune, 76 Mo. 200, the question arose in the administration of the assets of an insolvent decedent's estate. The language of their statute is, p. 206: "If there be not sufficient to pay the whole of any one class, such demands shall be paid in proportion to their amounts." Creditors had realized upon their collaterals *after proving* their claims, but *before distribution.* (P. 200.) The court held that conversion of the collaterals into cash operated as payment *pro tanto*, and that dividends should be made on the balance only, and say, p. 206: "Any other construction than this would clearly contravene the plain language and teachings of the statute and result in an inequality of distribution which the statute neither contemplates nor tolerates." On p. 207 the court suggests a query as to the rights of such creditors to participate if they had not collected their collaterals.

Philadelphia Warehouse Co. vs. Anniston Pipe Works, 106 Ala. 357, is a case where the assets of an insolvent corporation were in the hands of a receiver. After insolvency and appointment of the receiver, the Warehouse Co., a creditor, collected a large sum on its collaterals. Whether such collection was made before or after proving its claim is not clear from the statement of facts, but the court treat that fact as immaterial, and approve the rule that where collaterals are collected before dividend the dividend should be made only on the residue of the claim.

In the London and San Francisco Bank vs. Snell, Heitshu & Woodward Co. (U. S. Circuit Court for the District of Oregon), 83 Fed. 603, a receiver was appointed for the company upon the application of the bank, a creditor for a large amount, holding collaterals consisting of book accounts,

whose claim had been recognized by the Court by an order for payment of interest. Afterwards $7,000 was collected upon the book accounts. The Court intimates that the weight of authority, perhaps, does not make the amount due at time of distribution the basis for dividends, but adopts that rule for the reason that the bank had received interest.

Erle vs. Lane, 22 Colo. 273, is a recent, well-considered case, where, after proof against a decedent's estate, collateral was realized upon before distribution. The Court of Probate had permitted a dividend upon the original amount of the claim. This order was reversed. The Court distinguish between cases of assignment for the benefit of creditors and cases of decedent's estates (the statutes of Colorado making creditors in assignments *cestuis que trustent*). On page 279 the Court say, after stating that the creditor may prove for the full amount (italics ours): "Yet if, before or *after* the claim is proved, he disposes of the security and realizes thereby a partial payment of the claim, *he has derived all the benefit it was intended to give*, and all that, under his contract, he is entitled to receive, and it no longer exists for any purpose. In other words, if he disposes of his collateral and puts it out of his power to return it in case his debt is paid, it ceases to be collateral, *and the sum realized operates as a payment* and reduces his claim *pro tanto*. By his own voluntary act he parts with the double right the law gives him, and thereafter can proceed only for the remainder of his claim, and is entitled to dividends only on that amount."

Whittaker vs. Amwell National Bank, 52 N. J. Eq. 400, involves a large number of questions as to marshaling liens, one of which was the rights of general and secured creditors of one Jonathan Steward, who had assigned for the benefit of his creditors. It is a recent decision (1894) by Vice-Chancellor Bird. He says, p. 418: "Mr. Steward made assignment of certain securities which he held to different creditors

as collateral security for their claims. What are their rights as against the general creditors of Mr. Stewart? It is my judgment that they may file their claims with the assignee for the whole amount due them, without being compelled, in the first instance, to release their collaterals; but they are only entitled as against general creditors to a dividend out of the assets in the hands of the assignee upon the balance of their claim after having received the value of such collaterals."

The case of Thibaudeau vs. Benning, 20 S. C. Can. 110, came up on appeal from the Queen's Bench of Montreal, where it is reported in Montreal L. R., 5 Q. B. 425. It was a case under an assignment for the benefit of creditors and the question arose under the *common law*, as appears from Chief Justice Dorion's opinion in the Queen's Bench, p. 437. The Queen's Bench held, as expressed in the syllabus: "A creditor who holds notes or merchandise as collateral security is not entitled to be collocated upon the estate of his debtor in liquidation, under a voluntary assignment for the full amount of his claim, but is obliged to deduct any sums he may have received from other parties liable on such notes, or which he may have realized upon the goods; and it does not matter at what time such sums have been received on account, provided it is before the day appointed for the distribution of the assets of the estate on which the claim is made." The decision is based on the ground that sums realized upon the collateral operate as payment *pro tanto*. The Supreme Court affirmed the decision of the Queen's Bench.

In The State of Nebraska vs. Nebraska Savings Bank, 40 Neb. 342, the question arose on the distribution of the assets of an insolvent state bank. The court, after a full discussion of the question, in which they approve Amory vs. Francis and *In re* Frash, *supra*, hold that collaterals, realized upon before distribution, must be deducted and dividends

made only on the balance due, and that the creditor must surrender to the receiver the collaterals to be collected or disposed of as the court may order for the benefit of the creditor. There was no statute bearing on the subject. Referring to the contention that the creditor should be allowed to draw dividends on his full claim, the court say, p. 350: "The secured creditor would obtain an advantage over the unsecured one, to which no rule of law or equity entitles him, and which can not be accorded him without working injustice to other parties."

The following authorities hold that the creditor shall deduct from his claim the proceeds of any security realized before proving or sending in his claim to the official liquidator:

Furness vs. Union National Bank, 147 Ill. 570.
Levy vs. The Chicago National Bank, 158 Ill. 88.
In re Barned's Banking Co., 5 L. R. Chan. App. 18.
Fottrell vs. Kavanagh, 10 Irish Rep. Eq. S. 256.
Eastman vs. Bank of Montreal, 10 Ontario Rep. 79.
Cooper vs. Molson's Bank, 26 S. C. Can. 611.

In Furness vs. Union National Bank, the court say, p. 573: "The creditor has a right to prosecute his claim for the full amount against the estate of the deceased debtor in the hands of the administrator, as he had a right to prosecute it for the full amount against the debtor when alive. Of course, this right is subject to the condition that the whole amount of his claim is due to him when he files and proves it. If he has realized upon his collateral before filing and proving his claim, he voluntarily parts with the double right secured to him by the law, and can only proceed for what is actually due to him; that is to say, for what remains of his claim after deducting the amount realized from the collaterals."

In Levy vs. The Chicago National Bank, 158 Ill. 88, the

English and American authorities are reviewed, and the court expresses its conclusion as follows, p. 102: "Our conclusion is, that the amount upon which the secured creditor is entitled to receive dividends from the assets of the insolvent estate is the amount actually due to the creditor when he files his proof of claim or presents his claim under oath; that the subsequent hearing upon objections or exceptions should be directed to the inquiry as to what was due at that date; that the amount due at that date is to be ascertained by the deduction from the principal debt of all payments made before that date, whether realized from collaterals or otherwise, but that amounts realized from collaterals after that date are not to be deducted, subject always to the qualification that the dividends received from the general assets and the amounts realized from the collateral security shall not together exceed the amount due the creditor upon his claim." The court expressly dissent from the statement of the learned judge who delivered the opinion in the case at bar in the United States Circuit Court of Appeals, that there is no logical basis for any distinction between the effect of collections made from collaterals after insolvency and before filing proof, and of those made after filing proof. They show that in Illinois, at least, creditors have no such "fixed" equitable ownership in the assets as will prevent its yielding to a payment received by the creditor before he proves his claim.

The plan of proving a fictitious amount—the amount *formerly* due—in order to obtain a dividend large enough to pay what is *now* due may be logical, but it does not seem to be fair.

The English and Canadian cases cited show that this rule of distribution is well established in both England and Canada. That is to say, in both countries the creditor must *at least* credit the proceeds of collaterals received *before proving* his claim. In Canada, however, as appears from Thibaudeau vs. Benning, 20 S. C. Can. 110, the creditor must also deduct

all proceeds of collaterals received before *dividends*, prorating only on the balance. In England it seems to be settled by Kellock's Case, L. R. 3 Chan. App. 769, that proceeds of collaterals received after proof are not to be credited. The principal reason assigned is that the official liquidator might be tempted to delay dividends, hoping for the creditor to realize on his collaterals. We respectfully submit that this danger is not so imminent as the corresponding danger of *creditor* and *collateral debtor* agreeing to defer payment of collateral under the rule in Kellock's Case. The delay of the officer (liquidator or receiver) is *illegal*—a breach of his sworn duty. The delay of the others, creditor and collateral debtor, is but the legitimate adjustment of their private affairs so as to enable the creditor to reap the reward of a larger dividend offered by the law. He could well afford to be more lenient to the collateral debtor.

In re Barned's Banking Co., 5 L. R. Chan. App. 18, it is held that proceeds realized from collaterals before *formal proof* to the official liquidator must be deducted from the amount on which dividends are based, although *before the proceeds were realized* the claim had been sent by a notary public to the official liquidator for *payment*.

Let us now refer to the authorities cited by the counsel for appellee, and see how far they justify the claim made by them.

This question is touched upon in the case of *Lewis, Trustee*, vs. *United States*, 92 U. S. 618.

In that case there was no question of dividends. The United States was held to be entitled to be paid in full before other creditors were entitled to anything. And the court held that this rule applied to the estate of all the partners.

The Trustee denied this right, and this was the only question arising in the case. In deciding the case, however, Justice Swayne, on page 623, says:

"It is a settled principle of equity that a creditor holding collaterals is not required to apply them before enforcing his direct remedy against the debtor."

This is the general rule, but no such claim is made here. But the court does not hold that equitable considerations may not vary this rule. On the contrary, it considers the considerations urged for varying it in the case before the court, and argues that such considerations are all in favor of enforcing the rule. It is scarcely necessary to say that had the United States at that time been paid part of its claim by the sale of these collaterals, it could only have asked for the balance then due to it after crediting such payment.

In the case of *Moses* vs. *Administrators of Ranlet*, 2 N. H. 488, referred to in complainant's brief, Justice Redfield, in deciding the case on page 489, says:

"It is not pretended that any part of the sum allowed by these commissioners had previously been paid or released, and the only ground for its rejection seems to be the circumstance that the plaintiff has for such eventual payment collateral security. But in ordinary cases this circumstance is no objection to a suit and recovery of the whole claim, since the creditor can in no way obtain but one payment of his demand. Such it is admitted would be the case here if the debtor were alive. But the death of the debtor can not itself change the principle of justice, or the terms of the contract, and the Statute does not profess to make any change except to introduce an equal division between creditors of said estate, as belonged to the insolvent at his death."

We submit that if part of the sum allowed by the commissioners had been paid, as in the present case, the judg-

ment of the court would have been different. Also, if the death (in the present case the insolvency) of a debtor cannot in itself change the principles of justice so as to prevent the creditor suing for the full amount due him, neither can it permit him to prove a larger claim than he could sue for and recover if death or insolvency had not intervened.

In the case of *West* vs. *Bank of Rutland*, 19 Vt. 403, Justice Redfield, on page 409, says:

"It is true that if the securities had been converted into money, and it is between debtor and creditor, it ceases to be collateral, and operates directly as payment, so that the debt is thereby reduced, and the creditor can only sue for the balance."

And, again,

"In England and in this country in such case the court of chancery will oftentimes compel the party to apply the funds in his hands, and only proceed against the other funds for the balance, and if the funds are not money, will require them to be reduced to money, but in no case where it is merely collateral will a court of equity compel its application, unless the debtor stands in the relation of a co-surety."

The cases of *Finley* vs. *Hosmer*, 2 Conn. 350, and *Walker, Smith & Co.* vs. *Barker*, 26 Vt. 711, are similar as to the facts. In both cases the claims had been presented and allowed. The creditors held mortgage securities for their debts. They afterwards foreclosed their mortgages, in both cases the court held that they were entitled to dividends on their full claim; but, as will be seen, they had received nothing at the time their claims were presented and allowed.

In the case of *Allen* vs. *Danielson*, 15 R. I. 480, the court also held that the party was entitled to a full dividend upon his claim, without regard to the collaterals held by him. In this case the payment from the collaterals was not made until

after the second dividend had been declared. This case is in direct variance from a decision of the same court made a short time previous, and to which we have already referred.

Counsel for complainant cites also a number of cases decided by the Supreme Court of Pennsylvania.

The foundation case cited and followed is Miller's Appeal, 35 Pa. St. 481. After an assignment in trust for creditors, one of the creditors attached a legacy, which was left to the insolvent debtor after the assignment, and having applied it on his debt, was thereafter permitted to prove for the original amount of his claim. Mr. Justice Strong says, p. 483: "It is not as a creditor that he is entitled to a distributive share of the trust fund. His rights are those of an *owner* by virtue of the deed of assignment. The amount of the debt due to him is important only so far as it determines the extent of his ownership. The reduction of that debt, therefore, after the creation of the trust and after his ownership had become vested, it would seem, must be immaterial. If it be suggested that the whole debt due Miller might have been paid by the assignor after the assignment and before distribution, the answer is at hand: Miller's right to participate in the distribution at all is only a right in equity, it requires the aid of a chancellor, and that aid will not be given if the whole debt is paid."

That creditors have equitable rights in the trust fund, that they are in a sense *cestuis que trustent*, is clear. But that they are *owners*, with an ownership so fixed and absolute that it is entirely independent of the debt out of which their interest grows, unless the whole debt is extinguished, is not so clear. If "the amount of the debt due to him is important *only as it determines the extent of his ownership*," how can that debt have sufficient force and validity to be the foundation of an action to subject the legacy to its payment? If it is not *all* in full force and validity, how much of it is? Is it not clear

that if the legacy had been not more than sufficient to pay the whole debt, the creditor could have recovered the full legacy? If, however, the debt *is* in full force, how can the creditor retain his claim unimpaired and undiminished, and at the same time *own* some of his debtor's property? Does the law or equity transfer property from the debtor to the creditor without affecting the debt? Again, suppose that the assets in the hands of the assignee should be stolen or lost by a cyclone, upon what *owner* would the loss fall? Such loss would disappoint and injure the creditor, but would no more affect his claim than if the property were being transmitted by the debtor's own agent instead of through the agency of law.

We respectfully submit that the answer of the learned Justice to his own suggestion, about the effect of full payment of the debt on ownership, is not sufficient. It says, in effect, that although this doctrine leads to a logical absurdity, the chancellor can avoid the consequences. If the debt, as it is reduced by payment, is permitted to measure the right to dividends, there will be no absurd consequences to require the chancellor's intervention.

The difference between paying the creditor a dividend upon his *whole claim* when it has *all* been collected, and paying the same dividend when a *part* of the debt is in his own pocket, seems to be not a distinction in equity, but simply a difference in the *degree* of injustice to other creditors.

When it is once admitted, as it is in Pennsylvania, Assigned Estate of Wilhelm, 182 Pa. St. 281, that the principal debt is in part *extinguished* by the proceeds of collateral received by the creditor, the whole argument, based on the right of the creditor to follow the assets as he could have followed the debtor, is inapplicable, and the logical advocate of the collaterally secured creditor's right so to manipulate his

claim as to obtain dividends on the original amount is forced to resort to some technical theory which will give the creditor rights independently of the *debt*. The "fixed ownership" theory meets the situation. Any theory, which permits a creditor to obtain the full benefit of a whole claim when part of it is gone, seems utterly subversive of that nursery maxim of political economy, "You can not eat your cake and have it too."

Although this Pennsylvania doctrine has been repeatedly asserted by its courts, they have thrice failed to enforce the rigor of its logic.

In Sweatman's Appeal, 150 Pa. St. 369, a prospective landlord, at the request and for the accommodation of a prospective tenant, purchased a lot and erected a building for the tenant, under an agreement that the tenant should lease the premises for a term of years to compensate the landlord. The lease was executed, binding upon executors, administrators and assigns, with covenants to pay rent and to terminate the lease for breach of covenants or conditions, without release of damages for such breach. Prior to the termination of the lease the tenant made an assignment for the benefit of his creditors, and the assignee abandoned the premises. The landlord was permitted to prove a claim for damages for failure to compensate him for his investment. Here there was no breach of any agreement *at the time of the assignment*. If creditors at the time of the assignment have a fixed ownership it is difficult to see how the landlord had any standing as a creditor.

In the Assigned Estate of Wilhelm, 182 Pa. St. 281, above cited, as to the effect on the debt of realizing on collaterals, the chancellor did even more than was suggested he might do by Mr. Justice Strong, in Miller's Appeal. The Court would not permit the creditor, whose claim was partly

paid by collateral realized after the assignment, although the creditor even refused to apply the proceeds of the collateral on his claim, to claim *interest* against the estate, to which he would have been entitled but for the payment. A very just decision, but justice came from the chancellor and not from the "fixed ownership" doctrine.

In a case decided by the Pennsylvania Superior Court, composed of seven Judges, *In re* Wetzler's Estate, 3 Pa. Sup. Ct. 435, a creditor had obtained judgment against his debtor and levied execution on personal property, after which the debtor assigned for the benefit of his creditors. Before dividend the creditor realized part of his claim out of the sale on execution. With this in his pocket he asked for a dividend on his whole claim. The Court unanimously held that it should be deducted and his dividend paid only on the balance. The decision was based, not on the ground that the levy was a satisfaction *pro tanto*, but on the ground that the personal property levied upon did not pass to the assignee.

It seems that the Pennsylvania theory does not work smoothly in its practical application.

In favorable contrast with the case of Miller's Appeal is the case of Combs vs. Union Trust Co., 146 Ind. 688. There the creditor, after an assignment in Indiana, went into another State and collected part of his claim by attaching property, which, however, was owned by the debtor at the time of the assignment. The Indiana Court applied the proceeds, not on his claim, but on his *dividends* in the assignment case.

But if the Pennsylvania theory is correct as to an assignee in insolvency, it ought not to be applied to the receiver of a national bank and to the Comptroller of the Currency, who is required to make "a ratable dividend," and has not the power of a chancellor to neutralize the injustice of a logical theory.

Outside of Pennsylvania the authority for appellee's contention is meager.

In the case of Brown vs. Merchants' Bank, 79 N. C. 244, there was a claim against the estate of McMurray & Davis. It was claimed that payments made by the estate of Greer & Alexander, who were endorsers on the paper which was the foundation of the claim, should reduce the amount to be allowed. Two points appear from the opinion:

No payments were made from any source upon the debts provided for in the assignment of March 8, 1875 (that of Greer & Alexander), before the assignment of McMurray & Davis was made, and the dividend was made long afterwards. Second, the payments were made by the sureties and not by the principals.

In the case of *Kellogg* vs. *Miller*, 22 Oregon, 406, the claim was secured in part by mortgage; no payments had been made upon it. The Court held that it could not compel the creditor to foreclose the mortgage before receiving a dividend.

In Michigan two cases are cited.

In the case of *The Southern Michigan National Bank* vs. *Byles*, 67 Mich. 296, the claim was proven January 17, 1884, but the payments which it was attempting to have credited on the claim were made afterwards.

In the case of *Bank* vs. *Haug*, 82 Mich. 327, the debt was proven April 16, 1889; a dividend was declared June 26, 1889, and paid to all but the plaintiff in that case. The payment to the creditors was made December 2, 1889. On page 610 the court says:

"The question here presented is an interesting one. If it were new in this State much could be said, and many authorities cited in support of either position; but we think the

question is ruled by the case of *Southern Michigan National Bank* vs. *Byles*, 67 Mich. 296."

The case of *Morton* vs. *Caldwell*, 3 Strobh., Chy., 162, was itself a reversal of the decision of the lower court, and so far as the questions involved in the present discussion are concerned, is clearly reversed by the same court in a later case already cited in this brief. In that case, however, it was not a question of collection from collaterals, but as between the makers and endorser of a promissory note whether a collection from one would reduce the dividend from the other.

The case of *People* vs. *Remington*, 121 N. Y. 328, is also relied upon. In that case it was held that a creditor of an insolvent corporation whose assets were in the hands of a receiver, had a right to prove and have dividends upon his entire debt, irrespective of collateral security held by him.

It is claimed that in this case there had been payments made before the claim was proven. But this, we think, is not the case, for, on page 332, the court in stating the question involved, says it is

"Whether the receiver, as the personal representative of the insolvent, could reduce the claim of the creditor for the purposes of a dividend by compelling a deduction from the *amount of the proved debt* of the value of collateral securities or any proceeds thereof."

The inference from this language, we think, is clear that the proceeds referred to were collections after the debt was proven but before the dividend was declared, and in confirmation of this view, on page 336, the court states its conclusions thus:

"The creditor is entitled to prove against the estate *for what is due to him*, and to receive a dividend on that amount."

And on page 334 it says:

"Then on what principle can we hold that because the debtor becomes insolvent the contract with his creditor is changed, and that the creditor can not under those circumstances enforce his direct claim against the debtor until he has realized on his security?"

Will it be claimed that if the debtor had not become insolvent that the creditor could have sued upon his entire claim without crediting the collections made from collateral prior to bringing suit?

And also on page 335, after quoting the case of *Greenwood* vs. *Taylor*, the court says:

"In equity, however, a party may come in and prove without giving up or affecting his security, except so far as the amount of his debt may be diminished by what he may receive."

And in the report of the same case in 54 Hun., 511, the court says:

"It does not appear that any of the money received from the sale of the pledged property has been applied to the payment upon the debt, either by the agreement with the receiver or by any claim to that effect made by the bank alone."

This review of the various authorities in the courts of the United States, we think fully sustains the claim made by the receiver in the present case. Not a single case clearly holds that a creditor can prove a larger claim than is actually due to him when he presents it, except one or two of those in Pennsylvania; and they are based upon a legal claim arising out of the character of the deeds of assignment, which does not exist in the case of receivers of national banks.

And why should this not be so? Why should a creditor

be permitted to prove for a larger sum than is actually due to him at that time? Why should a different rule be established in cases of payments realized from collaterals and payments made from any other mode?

Equality among creditors is the general rule of distribution adopted as to the assets of all bankrupts. This rule is especially applied to a distribution of the assets of insolvent national banks. Why should the courts attempt to evade this rule in favor of a special creditor, as is attempted to be done in the present case? The sentiments expressed by the eminent judges who decided the cases already cited, and the universal provisions of the bankrupt laws both in England and in the United States indicate the views of jurists and legislators upon this subject; and agree in the position that equality among creditors requires that one party shall not be entitled to receive full dividends upon his entire claim and also the payments he may receive on it from securities held by him, whether such payments were received before or after the presentation of the claim, provided only that they were received after bankruptcy occurred. The principles adopted in the bankrupt laws should be adopted in all equitable proceedings as the proper rule. It is just and fair to all. It gives to the creditors holding securities the full benefit of that security and places them as to the portion not secured on a perfect equality with other unsecured creditors.

If in the opinion of this court the established rules of equity prevent it from applying the principles of the bankrupt laws in their entire extent by compelling creditors to exhaust their security first, and prove for the balance only, it can at least as in bankruptcy limit the dividends to the amount actually due when such dividends are declared, or if not that, then to the amount due when the claim is presented and proved.

As said before, the almost universal doctrine established by these cases sustains the decision of Judge Sage that all payments made prior to the proof of claim must be credited and reduce the amount to be allowed. But the majority of the cases go further and sustain the claim made by the receiver on his appeal. Payments made after the proof of claim and before the payment of a dividend to the creditors should have the same effect as if made before the claim was presented to the receiver. The same principle of equity, the same propriety to conform the distribution of the assets of insolvent national banks to the laws of the United States regulating bankrupt estates require that a creditor should receive dividends only upon the sum actually due to him. Such would be the rule applicable if the bank had not become insolvent. In that case at any time the claim would be the amount of the original indebtedness after deducting all payments made from that sum. And as creditors claim the same right that they would have if the bank had remained solvent, it is but just that they should submit to the same rule as to the amount due as would then apply. It is true that a creditor who holds collaterals may sue his debtor for the entire claim without reference to the collaterals, and although such collaterals may be more than sufficient to pay his debt, but it is equally true that the moment he receives a dollar from those collaterals he must credit it, and can then only sue for the balance remaining after such credit. There is no reason why the same rule should not apply after the debtor has become insolvent as before. At no time should he be permitted to receive a dividend upon more than is then actually due.

But this is not a new question to this honorable court. It was involved in a case of great importance where the interetss of the United States required the application of the

rule that dividends should be paid by the receiver of a national bank regardless of collateral realized upon after the insolvency of the bank. This plan of distribution was not suggested by counsel in the case, but the language of Mr. Justice Field indicates how the suggestion would have been treated if made.

Cook Co. National Bank vs. The United States, 107 U. S. 445.

So far as the case cited bears on the question, the facts are as follows: At the time of the suspension of The Cook County National Bank, January, 1875, the Treasury Department of the United States held $150,000, par value, of United States bonds belonging to the Bank *as security* for all public moneys therein deposited. These bonds were, after the receivership, duly sold for $174,544.52 by the Treasury Department, and after paying *in full* the amount on deposit with the Bank to the credit of the Treasurer of the United States, there remained a balance of $19,239.05. At the time of failure the Bank had on deposit, of postal funds, $24,900, and of money-order funds, $14,684, deposited by the Deputy-Postmaster of Chicago. The Treasury Department applied the balance, $19,329.05, ratably on these two funds, leaving a balance due from the receiver on account of the two funds of $20,344.95. The officers of the United States being in doubt whether the said balance was a preferred debt under the U. S. Statutes, the United States filed a bill in the Circuit Court of the United States for the Northern District of Illinois against the Bank and its receiver, asking for a decree directing the disposition of the funds of the Bank in the control of the Treasury Department for distribution. The defendants treated the bill as if filed to obtain a *priority* in the payment of the *balance* due for postal funds and money-order funds. A demurrer to the bill was overruled by the Circuit

Court and appeal was taken to the Supreme Court of the United States, where the demurrer was sustained and the cause remanded for a dismissal of the bill. While the only question expressly considered was the question of priority, yet the scope of the bill was large enough to authorize a decree for a dividend upon the original amount of the claim for postal and money-order funds, if the United States was entitled to that relief, but no such decree was entered. Mr. Justice Field says, p. 449 (italics ours): "With these provisions for security against possible loss for moneys deposited, it would seem only equitable that the Government should call for such security, and, *if it prove insufficient*, take the position of other creditors, in the distribution of the assets of the bank *in case of its failure*."

The italicized words indicate pretty strongly that the learned Justice did not disapprove of the treasurer's act in first exhausting the security and paying one claim *in full*, thereby disabling it, even under the Pennsylvania theory, from participating in dividends, nor is there the slightest suggestion that the claim for postal and money-order funds should be recognized for dividends in any larger sum than the amount due after applying the balance of the proceeds of the security.

While it does not appear in the record what assets the receiver held or what dividends he paid, it does appear that if the officers of the Treasury Department had withheld the full security, as appellee in the case at bar desires to do, a dividend of only eleven percent on the entire claims, together with the proceeds of the security, would have paid all the claims of the United States in full.

Counsel for the Chemical National Bank object to crediting on its claim the amount paid on the collaterals for another reason. They claim that the collaterals were not the prop-

erty of the Fidelity National Bank, and that, therefore, that bank is not entitled to a credit from their proceeds.

In the first place the collaterals were sent to the Chemical National Bank by Mr. Harper, the Vice-President of the Fidelity, in the same letter in which he asked for the loan of three hundred thousand dollars, and were sent to the bank as collateral to that loan. The Chemical received them as the property of the Fidelity, and treated them as its property. It credited the amount collected to it, and confessedly had no knowledge or suspicion that they belonged to any one except the Fidelity Bank. It does not pretend that any one at that time, or since, claimed any interest in those collaterals; and as against the Fidelity National, it has no right to deny the ownership of the latter any more than a lessee has the right to deny the ownership of the lessor in the property leased. It can only account for the collaterals to the party from whom it received them. And having received them from the Fidelity, it is under a legal obligation to account for them to it, and on the loan as collateral for which it received them.

Had a third party pledged these collaterals with the Chemical as security for the loan to the Fidelity, then ordinarily the claim made would be correct. The reason of the rule is that payments made under such circumstances not being made by the principal debtor, it is no payment of his indebtedness, and it is, therefore, immaterial to him whether the entire indebtedness is proved by the original creditor, or part by him and the balance by the surety who has made the payment. But this only applies to the case where the apparent debtor is in reality the principal debtor; not to a case where such debtor is a surety merely for the third party who made the payment; or when the circumstances of the case entitle him as between such principal and the party mak-

ing the payment to call on the latter to pay the debt. The doctrine is clearly stated in a case already cited,

In re Southier, 2 Lowell, 320.

In that case Justice Lowell reviews the authorities on that question, and in conclusion says :

"The better opinion at common law is that a payment made by a drawer or endorser does not exonerate the acceptor or maker unless the promise of the latter was made for the accommodation of the former, or there is some other equity which makes the note or bill the debt of the party who has made the payment."

This statement of the case is so in accordance with justice and the established principles of equity that we do not deem it necessary to cite further authorities. The reason of the rule referred to is that the party paying could in the one case prove a claim for the sum paid by him if the credit was allowed on the original debt. If this could not be done the reason of the rule wholly fails.

In the case at bar the money was borrowed by E. L. Harper in the name of the bank, but for his own use without any authority from or knowledge of the other officers of the bank, and by the perpetration of a fraud upon the bank, and the proceeds of the loan were immediately placed to his individual credit, and drawn out for his own use. It must be perfectly clear that if Harper had paid this debt, or any part of it, he could not have proved the sum so paid as a claim against the Fidelity National Bank; and the same rule applies to collaterals furnished by him either belonging to or controlled by him.

It is immaterial that this relation of the parties and the fraud perpetrated by him were not known to the complainant. In the case cited, the party making the payment appeared

to be the endorser, and it is not shown that any different relation was known to the holder of the paper. Yet it was permitted to be shown that although apparently an endorser, he was the party who should have paid the entire debt. And by the Statutes of Ohio in a suit on a promissory note against makers and endorsers, the law permits either party to offer evidence as to the real character of their obligation, and to have the judgment entered as surety against the one who in reality is surety, whether he appears in that relation on the paper or not.

Again, in the present case, the complainant supposed that these collaterals did belong to the Fidelity National Bank. This would naturally have been inferred by the complainant from the manner in which it obtained possession of them; the manner in which they were sent to it. The Chemical National Bank can not therefore complain if the same result should follow as would have followed had they actually belonged to the Fidelity Bank.

But what right has the appellant to make such a claim? It received the paper from the Fidelity National Bank, and has collected on it the sum of seventy-five thousand dollars, which it credited to that bank on account of the loan made by it, and no party has at any time made any complaint of this credit or contested the right of the Chemical bank to hold the money. It has seventy-five thousand dollars collected on account of this loan, and no harm is done to it by compelling it to credit it on that account so as to reduce the sum due to it.

III.

We maintain that the Chemical National Bank, in addition to the amount actually realized from collaterals, should be charged with the sum of $25,000, as of date June 28, 1887, on account of its negligent failure to present the Wilshire-Lewis note for payment on that date.

As to this fourth note, and which was the one matured first, June 28, the Chemical National Bank was the agent of the Fidelity to collect it, and if not paid at maturity to take the proper steps to fix the liability of the endorser on the paper.

It can not excuse its negligence to its principal by the claim that possibly if the note had been duly presented Lewis might not have paid it, and possibly if after the suit had been brought upon it a valid defense might have been made by the parties. The three notes which were duly presented for payment were promptly paid at maturity. And we have the right to presume that the other would also have been paid if the same course had been adopted. If the Fidelity Bank was interested in the payment of the other note, it had the right to be placed by its agent in the position which would entitle it to present and enforce its claim by suit. But by the negligence of its agent it can not make any claim against Lewis upon this note. The Chemical National Bank can not excuse its negligence by any such pretext as is made in this case.

But was the appellant guilty of negligence? The note was dated at Cincinnati, and was payable in bank at that place.

It seems hardly necessary to refer to authorities upon

this question. The duty of the Chemical Bank is thus stated by Daniels on Negotiable Instruments, section 327:

"It is the duty of the Bank, as soon as the bill, note, or check is placed in its hands for collection, to take appropriate steps necessary to its prompt payment or prompt acceptance, by making presentment for acceptance without delay, and presentment for payment at maturity. And if the instrument be not duly accepted or paid, the bank must take all necessary steps to fix the liability of the drawer, if it be a foreign bill, by placing it in the hands of a notary for protest, and by giving due notice of its dishonor to the party who endorsed the instrument to it for collection, whether it be a bill or note, inland or foreign. If the bank fail in any of these duties, it becomes immediately liable in damages to the holder."

This paper was left with the Chemical National Bank. It was its duty to present it for payment at the place where it was payable, and if not paid, to have the endorser properly notified so as to fix his liability. It did not do this; but retained the paper in New York until the day when it was due.

By this negligence, all of which is shown by the testimony of William J. Quinlan, the cashier of the Chemical Bank (Rec., p. 41), the sum of $25,000, which might have been realized out of the paper belonging to Harper, the real debtor, was lost.

The pretended excuse for not presenting the note for payment at Cincinnati, where Wilshire, the maker, lived, was the telegram of May 19, "Will want all returned here without presenting, as we advised parties to arrange payment here;" and the letter confirming this, which says, "Please do not present any of the collateral paper for payment. We have advised parties we would order back and charge up here." The paper in question was not payable in New York,

but in Cincinnati, and was not, therefore, covered by the direction not to present. But the directions were, "we want all returned without presenting," and "we have advised parties we would order back." The only authority contained in these letters was to return the paper to Cincinnati. The Chemical was authorized to return this note to the Fidelity Bank, if the latter had not failed. But it did not authorize it to retain the paper in New York and take no steps to charge the endorser with liability.

If the Fidelity did not order the paper back, it was the duty of the Chemical to send it to a proper collecting bank for presentment for payment. This it did not do.

But the Fidelity National Bank failed on June 21, 1887, and the Chemical knew it. Mr. Quinlan testifies that he knew that the Fidelity was in the hands of the Receiver on the 21st of June. Indeed, on the 18th of June the Chemical Bank was garnisheed by the Bank of Montreal in an action brought by it in New York against the Fidelity Bank.

The authority, if there was any, to return the collateral paper to the Fidelity Bank was abrogated by the failure of the bank and the appointment of a receiver. This very authority to return the paper to Cincinnati was coupled with the promise to send other paper in its place. And it was argued by counsel that the Chemical Bank was under no obligation to return the paper until the paper to replace it was sent. But the Chemical Bank knew that the receiver had no authority to substitute other paper for this collateral paper, and hence that that condition could not be complied with. The Chemical Bank, then, neither made proper efforts to charge the endorser, by having the paper presented for payment, nor did it return it to the Fidelity. So that in no view of the case can it escape the charge of gross negligence in this matter. Being guilty of negligence, its liability is

stated by Daniels on Negotiable Instruments, section 329, to be, "That loss is *prima facie* the amount of the bill or note placed in its or his hands."

This liability is in favor of its principal from whom it received the paper.

IV.

At the time of the rejection of the claim of the Chemical National Bank by David Armstrong, Receiver of the Fidelity National Bank, April 25, 1890, he made an offer to accept proof of a claim for $200,000, part of the amount claimed by the Chemical Bank, with a provision for abiding the result of judicial action as to the residue of the claim (Rec., p. 81 and p. 89, Armstrong Exhibit No. 3).

Had the Chemical Bank accepted the offer it would have received dividends on $200,000 and not waived any of its rights as to the residue of the claim. Ordinarily when a claim is rejected, and it is subsequently allowed by a Court, interest is allowed on dividends the claimant should have received from the time they should have been paid. The object is to place all creditors on an equal footing.

Armstrong vs. American Exchange Bank, 133 U. S. 433.

But the offer to pay a part ought, in equity, to stop interest *pro tanto*.

No right of the Chemical Bank was to be affected by the acceptance of the receiver's offer.

The counsel for appellant claims that under the offer of the receiver, the Chemical "must waive so much of the decision of the Court below as was in its favor, and consent beforehand to settle as if the receiver had succeeded *in toto*."

But this is not a fair construction of the receiver's offer, nor was any such claim intended. The offer was to pay dividends on $200,000 at that time; the balance was to be de-

termined by the decision of the Court upon the questions at issue.

The claim that all sums thereafter received from collaterals should be applied to reduce the amount of said claim, was only to take effect in case the Court held that the receiver had that right. The Chemical chose to accept nothing, but to bring suit for the full amount. It made no answer to this offer. It did not attempt to remove any obscurity which it might claim existed in the language used by the receiver.

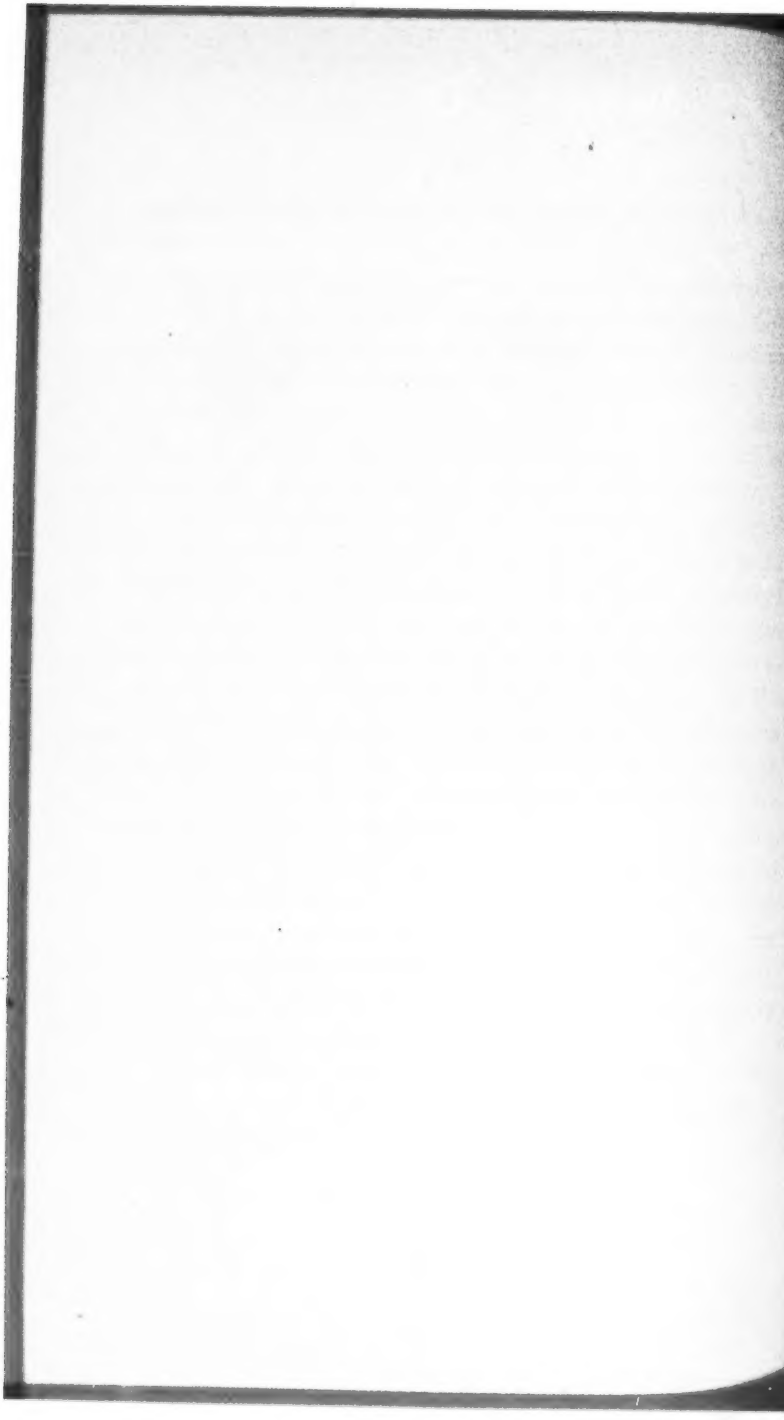
Nor does the fact that the receiver subsequently contested the whole claim, as he was in duty bound to do, seem to us to justify a judgment for interest on such dividends as he offered to allow. The complainant preferred to put the whole claim in litigation. If the litigation has been retarded by the contest of the *whole claim* more than it would have been by litigating the matters proposed to be litigated by the receiver in his offer, the extra delay is directly chargeable to complainant's refusal of the offer. If the litigation has *not* been prolonged to any extra degree by a contest of the whole claim, then the receiver is not responsible for any delay by denying the validity of the entire claim. The Circuit Court assessed a large amount of interest against the receiver for the sole reason that he contested the whole claim instead of such portion as he originally refused to allow. We respectfully submit that it was error to do so.

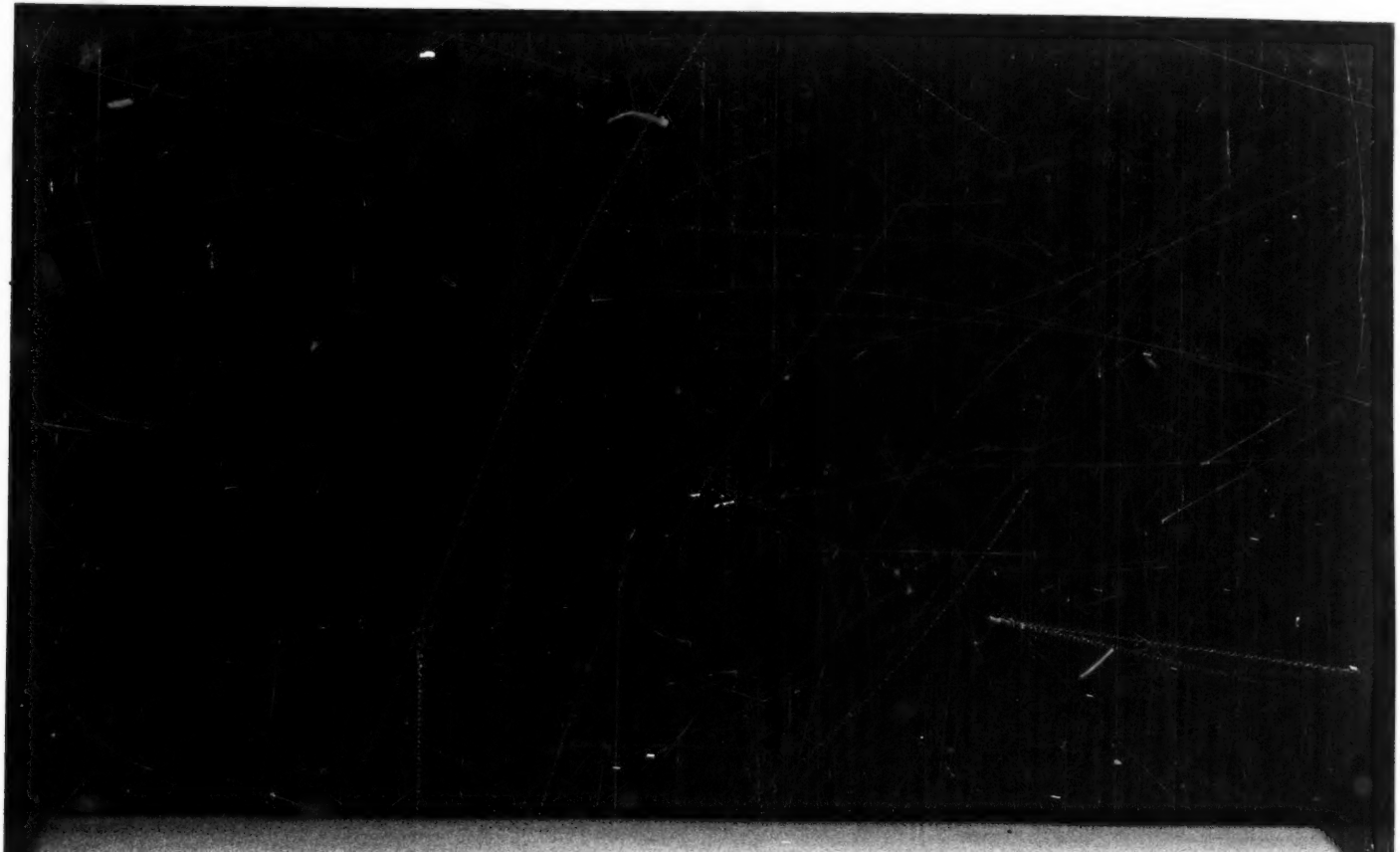
On the whole case we claim that the judgment of the Circuit Court of Appeals should be reversed and the bill of the complainant dismissed.

Respectfully submitted,

JOHN W. HERRON,
FRANCIS F. OLDHAM,
Counsel.

February 9, 1899.





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The Robert Clarke Company, Printers, Cincinnati. [*February, 1899.*

Supreme Court of the United States.

OCTOBER TERM, 1898.

David Armstrong, Receiver of the Fidelity National Bank of Cincinnati, Ohio,

Appellant.

No. 279.] *vs.*

The Chemical National Bank of New York,

Appellee.

Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR APPELLEE.

(The references to the Record here made are to the paging as given in the margin—that of the original transcript.)

HISTORY OF CASE.

This cause originated in a bill in equity filed by the appellee in the Circuit Court of the United States for the Southern District of Ohio, Western Division, against the appellant to establish a claim against the Fidelity National Bank arising from a loan of money secured by collateral (Rec., pp. 3–7). The answer first filed by the defendant (Rec., pp. 9–12) practically admitted the making of the

loan, but contended that the collateral should first be credited thereon and the claim established for the balance only, and alleged an offer to allow the claim provisionally for the balance remaining due after applying collections that had or should have been made from the collateral, without prejudice to the right of the plaintiff to sue for the balance. Exceptions having been made (Rec., pp. 12–15) and sustained (Rec., pp. 15–16) to this answer, an amended answer was filed (Rec., pp. 17–20) which denied the making of the loan, and contended that if it were made the collections from the collateral should be credited, and the claim established only for the balance. A replication was then filed (Rec., pp. 20–21); and upon these pleadings the evidence shown in pages 21–117 of the Record was taken, and the cause submitted to Judge Sage. His opinion at this hearing was omitted by stipulation (Rec., p. 1, paragraph 9) in making up the present transcript; but it will be found in 50 Fed., 799–809; with which should be read a memorandum prepared by him as to the form of decree and printed at Rec., pp. 117–118. A decree was entered in conformity with these opinions, which contained also an order made by consent that the original defendant should pay to the original plaintiff $100,000, without prejudice to the rights of either party upon the appeal, with provision for restitution in case it should be found that that sum exceeded what was due. From this decree both parties appealed; and as it was vacated on that appeal, it, as well as the assignments of error and appeal bonds thereon of the original plaintiff, were also omitted in making up the present transcript (Rec., p. 1, paragraphs 10–12); the assignments of error and appeal bonds of the original defendant will be found at pp. 118–120 of the Record.

On the appeal, as well as in the court below, the val-

idity of the loan was not seriously contested, the argument being addressed to the other questions involved. The Circuit Court of Appeals (Mr. Justice Brown and Circuit Judges Taft and Lurton) held that dividends should be paid upon the indebtedness as it stood at the date of insolvency without deduction because of the collaterals; the opinions rendered are also omitted from the transcript; they will be found in 16 U. S. App. 465; 59 Fed. 372; 28 L. R. A. 231. The Chemical National Bank then filed a petition for rehearing to correct an error into which the Court had fallen, as was conceived, with reference to the computation of interest. While this was pending the the opinion of this Court in *Western National Bank* v. *Armstrong*, 152 U. S. 346, was pronounced; and thereafter the present appellant also filed a petition for rehearing upon the question as to the validity of the loan. These petitions having been granted and the cause reheard, the Court (Circuit Judges Taft and Lurton and District Judge Severens) found that, in view of the decision of this Court just referred to, it was proper that each party should have an opportunity to introduce further evidence "on the issue whether the alleged loan created any liability against the Fidelity Bank at all"; and they, therefore, reversed the decree and remanded the cause with instructions to receive such evidence; and if, upon all the evidence, the issue as to the validity of the loan was decided in favor of the present appellant, to decree restitution of the $100,000 and dismiss the bill; and if decided against him, to enter a decree directing the Receiver to allow the claim in the amount due thereon at the date of the insolvency of the Fidelity Bank, and to pay dividends thereon as to other creditors, with interest from the presentation of the claim upon dividends theretofore declared, and from declaration as to those declared thereafter, crediting the $100,000 as a

partial payment; their opinion and the decree based thereon have also been omitted from the transcript; but the mandate, which set out the decree, will be found at pp. 323–324 of the Record, and the opinion is reported in 31 U. S. App. 65; 13 C. C. A. 47; 65 Fed. 573, and 28 L. R. A. 239.

Additional evidence was then adduced by both parties and the cause again submitted to Judge Sage, who found the issue defined in the mandate for the plaintiff, the present appellee (Rec., p. 307), and entered a decree accordingly (Rec., p. 318). The opinion of Judge Sage is also reported in 76 Fed. 339.

From this decree the defendant appealed (Rec., pp. 320-322). The appeal was heard by Circuit Judges Taft and Lurton, and District Judge Severens, and the decree below was affirmed (Rec., p. 328). The opinion of that Court, announced through Judge Taft, will be found on pp. 330-354 of the Record, and also in 54 U. S. App. 462; 27 C. C. A. 601; 83 Fed. 556.

From that decree the defendant has now appealed to this Court (Rec., pp. 356-364).

ERRORS ASSIGNED.

It will be found by pp. 358 and 359 of the Record that nine errors have been assigned.

Of these the first, second, and eighth are in legal effect identical, and go to the correctness of the conclusion reached by Judge Sage on the issue remanded to him after the first appeal to the Circuit Court of Appeals, as to the validity of the loan.

The third, fourth, and sixth go to the question as to how dividends should be computed upon a loan secured by collateral; the third contending that collections made upon the collateral should be credited upon the loan and divi-

dends computed upon the balance; the fourth that a collection lost by negligence is to be treated as if made; and the sixth that all collateral must be exhausted, and their proceeds credited before a dividend can be declared.

The fifth is a combined assignment embodying in effect all of the others just mentioned.

The seventh goes to the computation of interest upon dividends declared before the claim was established by adjudication. As printed, it contains an error which makes it senseless.

And the ninth is merely a general assignment of error in affirming and refusing to reverse.

The first, second, and eighth of these assignments are predicated upon the decision of this Court in *Western National Bank* v. *Armstrong*, 152 U. S. 346, and assume that the case at bar is not distinguishable from that case. We dispute that assumption; and it was negatived by the Court below. We shall hereafter point out in detail the differences between that case and this; differences so manifest and so broad as to prevent the decision there from being applicable here.

But we should fail in our duty to the profession, and to this Court, if we did not here and now, when the authority of that case is invoked, respectfully but earnestly request the Court to reconsider its opinion there pronounced. The briefs there submitted do not discuss the question decided by the Court; and we are credibly informed that it received as little discussion orally at the bar. Possibly to this is owing the assumption, apparent in the opinion, that the borrowing of money is not only not part of the business of banking, but so foreign to it as to be questionable in exercise and sustainable, if at all, only by special action of the board of directors.

We expect to establish to the satisfaction of the Court

that this assumption is a mistake; that the business of banking sprang from the borrowing of money, and through borrowing only it lives and thrives. The evidence we shall adduce to the Court upon this subject sheds such a different light upon it from that in which it was evidently viewed in the *Western National Bank case* as to alter totally the impression it makes upon the mind. In the light of that evidence, we repeat, we shall request the Court to reconsider the language used in that decision, and determine whether that language shall stand as the final expression of the views of this Court upon this important subject. And in that connection we respectfully submit the strong and courageous language recently used by the Supreme Court of Indiana in *Evansville* v. *Senhenn*, 41 L. R. A. 728 (not yet officially reported), viz.:

"While it is the policy of the law not to depart from decisions previously made by a court of last resort, yet the same law does require such departure where adherence to such decisions would be productive of more evil than the departure therefrom, and the establishment of the better and sounder rule."

With this explanation of the reason why we here discuss borrowing as a part of banking as if a question of first impression in this Court, we proceed to a statement of the case at bar.

STATEMENT OF FACTS.

The opinion of the Court below contains a very full statement of the facts and some of the evidence shown by the present record (Rec., pp. 331–342). That statement we commend to the attention of the Court. Passages here given in quotation marks are taken from it unless otherwise specially noted; and our only reasons for departing

from or attempting to enlarge upon it, are that we may refer the Court to the parts of the record where can be found the evidence in support of the facts stated, and that we may give some of the facts in greater detail and in a little different order than they were presented by the Court below. References to the pages of the record in the passages quoted are ours, as the Court below of course did not give such specific reference in its opinion; but we have thought it not out of place to refer this Court to the items of evidence supporting the facts as stated by the Court below.

The internal management of the Fidelity Bank. "E. L. Harper was a director, Ammi Baldwin was cashier and Benj. Hopkins was teller of the Third National Bank [of Cincinnati]. While occupying these positions they had been engaged together in wheat gambling, and had been charged with misconduct in the management of that bank in connection with the gambling. (Rec., pp. 174–176, 285.) In February, 1886, Harper and others organized the Fidelity Bank, and the bank opened for business March 1st. Harper took [in the names of himself, Mathews and Gahr] (Rec., pp. 302–305) more than one-quarter of the stock. He was elected vice-president; Baldwin, cashier, and Hopkins, assistant cashier. Shortly after organization a committee of the directors investigated the charges concerning Harper, Baldwin and Hopkins, made by Hearne, then president of the Third National Bank, but the directors declined to hear the report. Alter, a director, who wished to read the report, made himself still more obnoxious by asking to see the call-loan account, but access to it was denied him. (Rec., pp. 172–173.) The directors held four meetings in 1886—one in February to elect officers, the second in May to appoint a committee to draft by-laws, the third in August to approve the by-laws, and the fourth a special meeting to vote a dividend. (Rec., p. 156, Q. 3; pp. 246–255.) No other business was done by the directors during that year, and Harper managed the bank without the slightest supervision of any kind. At the annual

election [in 1887] Alter was dropped as a director, and of the nine elected (Rec., p. 256), Harper, Baldwin and Hopkins, Mathews, Harper's brother-in-law, and Gahr, his confidential secretary, constituted a majority. Mathews and Gahr, were, confessedly, Harper's puppets in the board. He gave them ten shares each to qualify them, and then each also held a large amount of stock in his name, which belonged to Harper. Mathews was first elected in February, 1886, and resigned to allow some one else to be elected in his place. (Rec., p. 247.) He was re-elected in January, 1887, to take the place of Alter and remained in the board to the end. The explanation of his position in the board, and of that of Gahr, is seen by the following question and answer. (Rec., p. 237, XQ. 3.)

"*Q.* Mr. Mathews, you said something a little while ago off the record, which did not go down in the stenographic report—something about your directorship being nominal. Will you explain what you meant by that?

"*A.* Yes, sir, It was understood between Mr. Harper and me—and I think the same is true as to Mr. Gahr—that we were to be directors only until others were found to take our places; and, in explanation, I will say that one time Mr. Harper told us that one of us would have to step out—that one of us would have to resign as director to allow somebody else to supply the place—and I know Mr. Gahr and I tossed coppers to see which of us would withdraw."

"Mathews was not only Harper's brother-in-law, but he was one of the executive officers of Harper's corporations—the Riverside Rolling Mill Company, Swift's Iron and Steel Works, and E. L. Harper & Co.

"In January, 1887, Harper and Hopkins entered upon a comprehensive scheme of wheat gambliag, and Baldwin was accessory thereto. In carrying out their plan, Harper raised money by discounting, with the funds of the bank, the paper of E. L. Harper & Co., Swift's Iron and Steel Works, and the Riverside Rolling Mill Company, in all of which companies he was the controlling member, and also by cashing the checks of these companies and carrying the checks as cash on the books of the bank. This was done

with the knowledge and connivance of Mathews, the director. In these ways Harper consumed of the money of the bank, between January and June, $750,000. (Rec., pp. 271–285.) The daily discounts were recorded in a book, which was open to the inspection of the directors. Kineon, one of the directors, repeatedly called the attention of Swift, the president, to the large discounts in favor of Harper's companies and objected to it. Swift reported the matter to Harper, who said that if Kineon ran the bank he would keep all the money in the bank. Swift called Kineon's attention to Harper's large credits, and Kineon wanted to know where he got them. No further investigation or inquiry was made, however, until Kineon's resignation, hereafter described. (Rec., pp. 179–180.)

"Harper's brokers in the wheat deal were Wilshire, Eckert & Co. He advanced, from the funds of the bank to that firm, on their notes and by cashing their checks and carrying the same in cash, a million and a half dollars, to be expended for his benefit in buying wheat on the Chicago market. (Rec., pp. 272–273.) He advanced, from the funds of the bank by way of discounts, to Whitely, Fassler & Kelly, a firm who were interested in the wheat deal, $375,000. (Rec., pp. 279–281.) He borrowed in February and March, 1887, in the name of the Fidelity Bank, from the First National Bank of New York, $400,000, used $113,000 of the Fidelity Bank's bills receivable in so doing and had $400,000 transferred to his credit on the books of the Fidelity Bank, without exhibiting any written evidences of his right to such credit. (Rec., pp. 206–207, 213–219.) He borrowed in the name of the Fidelity Bank, from the Chemical Bank, the $300,000 here in controversy, in March, 1887, and forwarded as security $146,000 of the bills receivable of the Fidelity Bank. In June, 1887, in order to tide over the stress in which the bank then was, he borrowed from the Chemical Bank about $1,000,000,* and transferred to that bank bills receivable of a greater value. He did this without any action by the

* An inadvertent error as to the amount borrowed; see p. 19 *infra*.

board of directors. During this period of less than six months over which these transactions extended, the board of directors held five meetings—one meeting in January to elect officers, another in February to approve of Harper's purchase of $340,000 in Government bonds to qualify the bank as a United States Government depository. These bonds were bought from the First National Bank of New York, and as a part of the contract of purchase that bank agreed to lend the $400,000 already spoken of (Rec., pp. 213–214), but it does not appear that this was known to the directors. The third meeting was held in March to declare a dividend; the fourth in March to vote an increase of stock, and the last in May, when Kineon, a director, demanded that the bills receivable be examined. Harper objected, and told Kineon he ought to resign. Kineon said he would if Harper would buy his stock, which Harper then did. (Rec., p. 181.) A committee of directors was then appointed to examine the bills receivable, but no record is made of its reporting. No other business was done by the directors than has been stated. (Rec., pp. 256–259.)

"The by-laws of the bank provided for monthly meetings, but during the year 1886 five meetings failed for want of a quorum. The by-laws provided that the president, vice-president and cashier should have power to discount and purchase bills, notes and other evidences of indebtedness, and to buy and sell bills of exchange, and to sign all contracts, drafts and checks. The cashier was made responsible for all the moneys, funds and valuables of the bank and was required to deliver the same to the order of the directors. The president and vice-president were made responsible for all sums of money and property entrusted to them or placed in their hands by the cashier. The last by-law expressly forbade the carrying of checks or other memoranda as cash, but required them to be entered upon the books as call loans. (Rec., pp. 250–252.) In spite of this, Mathews, one director, was privy to the carrying of $400,000 for several months in this way for Harper's accommodation. The president, Briggs Swift,

and Chatfield and Moorehead, directors, were also accommodated in this way. Watters, the general bookkeeper, testifies that from the beginning to the end of the bank, the entries of cash upon the book were false, because of these so-called cash items (Rec., pp. 211–212); and Hinsch, the assistant receiving teller, testifies that nothing was carried as a cash item except upon Harper's order." (Rec., p. 177, Q. 8.)

The whole situation was correctly summed up by the appellant in sec. 20 of the bill brought by him against the directors for redress because of their misfeasance and nonfeasance, quoted *infra*, p. 24. Harper was suffered to conduct the affairs of the Fidelity Bank as he thought best. If any director ventured to inquire or to comment, he was forthwith suppressed (Rec., Alter, pp. 172–176, QQ. 6–16, RDQQ. 20–26; RRDQ. 27; Hinsch, p. 176, QQ. 4–6; Kineon, pp. 178, 181, QQ. 6–9, 26–28; Gahr, p. 203, QQ. 8–11; Watters, p. 235, XQQ. 53–62; Pogue, p. 244, XQQ. 1–12). For all practical purposes Harper was the bank, so far as persons dealing with it were concerned.

The relations between the Fidelity and Chemical Banks.— The dealings between these banks began with the opening of the Fidelity Bank, March 4, 1886, and continued till it closed its doors on June 21, 1887 (Rec., Quinlan, p. 38, QQ. 95–97). The banks made collections for each other, and in addition, the Fidelity made the Chemical the authorized New York depository for its reserve, and kept an ordinary deposit account there. In short, the Chemical was the New York correspondent and reserve bank of the Fidelity. (Rec., Quinlan, p. 30 *et seq.*, QQ. 3–8, 53, 54.) The usage between the banks was for the Chemical Bank to balance the account on the first of each month, and to send to the Fidelity Bank an account current showing the transactions for the preceding month since the last balance,

just as a bank periodically writes up, balances, and returns its depositor's pass book; the Fidelity Bank checked off this account with its own books, noted on a sheet called a reconcilement sheet all entries that were not identical; noted on the back of this sheet in detail all drafts drawn upon, but not yet presented to the Chemical, as shown by its account; reconciled the differences as far as an examination of their own books and papers would explain; and then wrote to the Chemical Bank for explanations as to the remaining discrepancies, mentioning them item by item, and generally requesting a return of that letter with the explanations noted thereon; this request was complied with by the Chemical, and occasionally other letters were sent, giving further explanations as to matters not fully investigated when the Fidelity's letter was returned. (Rec., Quinlan, p. 32, Q. 31; Watters, p. 224, QQ. 1, 2; pp. 228–233, XQQ. 1–38; Firth, pp. 139 *et seq.*)

On February 28, 1887, Harper, vice-president of the Fidelity Bank, mailed at Cincinnati to the cashier of the Chemical Bank in New York a letter, of which the following is a copy (Rec., p. 21):

" BRIGGS SWIFT, *President.* E. L. HARPER, *Vice-President.*
AMMI BALDWIN, *Cashier.* BENJAMIN E. HOPKINS, *Ass't Cashier.*

United States Depository.

THE FIDELITY NATIONAL BANK.

Capital, $1,000,000.00.

CINCINNATI, *February* 28, 1887.

Wm. J. Quinlan, Jr., Cashier Chemical National Bank, New York City:

Dear Sir: Enclosed herewith we hand you for credit our certificate of deposit No. 345 for $300,000, with bills as collateral, as follows: (Then was set out a list of twenty-seven notes, aggregating $326,000.) We desire to keep a large reserve with you, and we trust you will make the rate

as low as you proposed some time since. Please place the amount to our credit and advise the rate.

Respectfully yours,

E. L. HARPER, *Vice-President.*"

The certificate of deposit inclosed was as follows (Rec., p. 22):

"This certificate is not subject to check, but must be presented to draw money.

THE FIDELITY NATIONAL BANK.

No. 345.

CINCINNATI, *Feb.* 28, 1887.

E. L. Harper has deposited in this bank three hundred thousand dollars ($300,000.00) payable to the order of himself on return of this certificate in current funds.

$300,000.00. AMMI BALDWIN, *Cashier.*

Endorsed: E. L. Harper."

This letter of February 28th was not copied into the letter-press copy books of the Fidelity Bank.

The letter reached New York on March 2d, and upon that day Quinlan, cashier of the Chemical Bank, wrote and mailed the following letter (Rec., pp. 31–33):

"NEW YORK, *March* 2, 1887.

A. Baldwin, Esquire, Cashier:

Dear Sir: Your favor of the 28th inst. has been received. We credit Fidelity National Bank $300,000, and shall be considerate as to rate of interest when the loan is paid. . . . WM. J. QUINLAN, *Cashier.*"

Upon the books of the Chemical Bank was entered, on March 2d, this credit in favor of the Fidelity Bank (Rec., p. 32. Q. 27):

"Fidelity temp. loans, ... $300,000."

The letter just mentioned was the only advice of the loan sent by the Chemical Bank, until its March account

current was transmitted in April, and could not have reached Cincinnati by due course of mail before March 4. But in the meantime, on March 2, the bookkeeper of the Fidelity Bank, under instructions from Harper, had given Harper personally credit in that bank for $300,000, and had charged the Chemical Bank with the same sum. (Rec., Watters, pp. 73–74, QQ. 20–26.)

Of the collateral sent at that time, $146,695.30 belonged to the Fidelity Bank (Rec., p. 75, QQ. 35, 36). The residue comprised four notes made by J. W. Wilshire, and indorsed by J. V. Lewis, each for $25,000, which were accommodation paper executed and given to Harper for discount in furtherance of his wheat deal, the proceeds to be placed to the credit of Wilshire, Eckert & Co. (Rec., pp. 57–58); two made by Swift's Iron & Steel Works for $25,000, each; and two by the Riverside Iron & Steel Works for $15,000, each. The record contains nothing as to the circumstances under which these latter notes were made; but it does appear that Harper, who was the controlling spirit in each of these concerns, used their paper freely to further his wheat deal.

On the stub of certificate No. 345, in the certificate of deposit book then in use in the Fidelity Bank, is written the word "canceled" (Rec., Watters, p. 78, XQ. 54), and the only entry made on that book which can relate to this transaction is on the stub of certificate No. 497, which records the issue of a certificate to E. L. Harper, without date, for $300,000 deposited by himself; the stubs of Nos. 496 and 498 are dated, respectively, May 17 and May 21 (Rec., Watters, p. 72, Q. 9). The bookkeeper of the Fidelity Bank testifies he knows of no paper or obligations given by Harper to the Fidelity Bank at the time of the issue of that certificate, and that

ultimately his checks drawn were sufficient not only to exhaust this $300,000, but several hundred thousand dollars besides (Rec., pp. 74, 83; QQ. 27, 106–108); but it is not shown that Harper did not have $300,000 to his credit on February 28, 1887, nor what entries, if any, were made in his personal account at or about that date other than the one above mentioned; and it does appear that the amount constantly standing to Harper's credit was so large as to be a cause of gratification to the president of the bank (Rec., pp. 179–180, 182; QQ. 16, 17; XQQ. 13–15). It is quite consistent with the other facts appearing in the record that Harper may actually have had $300,000 to his credit on February 28, 1887, when this certificate of deposit was drawn; and it is not without significance in this connection that the bill of complaint subsequently filed by the receiver against the directors (Rec., pp. 271–289), though charging them for suffering many specific irregularities of Harper, does not charge that he caused this certificate of deposit to be issued without having funds then in the bank to answer for it, nor does it charge that his personal account was ultimately overdrawn.

Shortly after the first of April, 1887, the Chemical Bank sent to the Fidelity Bank its statement of account for the month of March as usual; upon this, under date of March 2, appeared a credit to the Fidelity Bank, as follows: "Tem. Loan, $300,000." The account starts on March 1st with a balance in favor of the Fidelity Bank of $24,360.65, and ends on April 1st with a balance against it, notwithstanding the above credit, of $32,675.97. The account was received by the Fidelity, turned over to Watters, the general bookkeeper, checked up by him with the books of the Fidelity Bank, found to be O. K.; and filed away with the archives of that bank. (Rec., Watters, p. 47; QQ. 48–49.

and Exh. 10.*) The usual reconcilement sheet was made out, showing the discrepancies between the books of the two banks. (Rec., p. 259.) Whether any letter was sent relating to the reconcilement is not known; no such letter can now be found in the Fidelity Bank files, where it would naturally be because returned with the answer on its face (Rec., McCauslen, pp. 158, 162; QQ. 16–22, 48–49; Watters, pp. 224, 229; QQ. 2–10; XQQ. 8–17); nor is there such a letter, or trace of any answer to it, among the papers of the Chemical Bank (Rec., Quinlan, p. 122; QQ. 3–6). The probability is, however, that such a letter was written, for the reconcilement sheet for March shows sundry items of difference; and the letter of the Chemical Bank to the cashier of the Fidelity Bank, dated May 11, 1887 (Rec., p. 269), refers to items appearing both upon the March account and the March reconcilement sheet, and is evidently an answer to inquiries as to those items. But whether such a letter was written or not, it is certain the loan of $300,000 was never disputed, nor was the accuracy of the entry of that loan reported by the Chemical Bank ever challenged or referred to. This is certain because: (1) No reference to this matter appears on the March reconcilement sheet, on which all differences were first noted; and (2) from the testimony of Watters, who says that, misled by the identity of the figures of the loan with those on the Fidelity's books for the transfer of funds directed by Harper, he checked off the items as corresponding, and needing no further investigation. At the same time, he admits, and could not but admit, that the items were not identical, and that the entry on the statement furnished by the Chemical Bank signified clearly and distinctly a loan by that bank

* This Exhibit was omitted by inadvertence from the original transcript; it has since been certified by stipulation, and printed separately, to be attached at the end of the main record.

to the Fidelity Bank, and nothing else. (Rec., Watters, pp. 226, 233; QQ. 12–16; XQQ. 39–40.)

On April 24, 1887, one of the bills receivable sent to the Chemical Bank as collateral fell due—a note by the Jung Brewing Co. for $10,000; and as that day was Sunday, was paid to the Fidelity Bank on April 23. (Rec., Watters, p. 83, QQ. 109–113.) This note had been returned from the Chemical Bank probably on April 19; its proceeds were never remitted back. (Rec., Quinlan, p. 39, XQ. 109; we take it the statement there, "returned May 19," is a mistake in reading the entry when the deposition was taken.)

The account for the month of April, 1887, having been sent by the Chemical Bank early in May, a reconcilement sheet was made for that month as usual (Rec., p. 261); and on May 12 a letter was written by the Fidelity, calling attention to the matters of difference needing adjustment, which was returned on May 19, 1887, with the answer written thereon. (Rec., p. 263.) Meantime, on May 11, the letter above referred to had been sent by the Chemical Bank, referring to differences in the March account (Rec., p. 269); and on May 18 another letter had been sent by it in partial answer to the Fidelity Bank's inquiries of May 12. (Rec., p. 269.)

On May 19th the following telegram was sent to the Chemical Bank (Rec. pp. 27, 37–38; QQ. 89, 90):

"CINCINNATI, *May* 19, 1887.

To Chemical National Bank, New York:

We send other bills to take place. Will want all returned here without presenting, as we advised parties to arrange payment here. FIDELITY NATIONAL BANK."

On May 20th Harper wrote and mailed the following

letter on the letter head of the Fidelity Bank (Rec., pp. 27, 38; QQ. 92–94):

"*May* 20, 1887.

William J. Quinlan, Jr., cashier, New York.

Dear Sir: Please do not present any of the collateral paper for payment. We have advised parties we would order back and charge up here. We will to-morrow send you new notes to take place of ones maturing. We will pay the loan July 15th, and will pay interest till that date, if agreeable to you. Yours truly,

E. L. HARPER, V. P."

On May 21st Harper wrote and mailed the following letter, also on the letter head of the Fidelity Bank (Rec., pp. 23; 29, QQ. 40–45):

"CINCINNATI, *May* 21, 1887.

Chemical National Bank, New York City.

Gentlemen: Enclosed herewith we hand you to hold as collateral the following bills: (Then follows a list of twenty-one notes, aggregating $230,592.46.)

Will you kindly return to me the following: (Then follows a list of nineteen notes of those forwarded in his letter of February 28th.)

We will pay the loan July 15, 1887, if agreeable to you, and will pay interest now to that date.

Respectfully yours,

E. L. HARPER, *Vice-President.*"

The substitution of collateral was effected in accordance with this request.

Of the collateral returned $92,495 belonged to the Fidelity Bank; the residue, aggregating $105,000, comprised the notes of Swift's Iron & Steel Works, and of the Riverside Iron & Steel Works, and one of the Wilshire notes above alluded to. None of the substituted collateral belonged to the Fidelity Bank. (Rec., p. 76, Q. 40.)

This left the collateral remaining with the Chemical

Bank as shown in Exhibit A attached to its bill of complaint (Rec., p. 7), amounting in the aggregate to $334,382.39; and of this only $19,200—four notes of the Champion Machine Company, one for $4,500 maturing July 24, one for $5,200 maturing July 28, one for $5,000 maturing August 3, and one for $4,500 maturing August 20, all in 1887—belonged to the Fidelity Bank.

The account for the month of May was forwarded by the Chemical Bank, checked and reconciled by the Fidelity Bank, and a reconcilement sheet prepared, and questions asked thereon and answered, as usual, early in the month of June. (Rec., pp. 264–265.) Later in June the Fidelity Bank requested of the Chemical Bank a further loan, and forwarded as security a little over a million dollars, face value, of bills receivable, upon which the Chemical Bank, on June 17, advanced $200,000 by crediting the deposit account of the Fidelity Bank with that sum as a loan. (Rec., Quinlan, p. 35, QQ. 55–57; p. 105, Armstrong Exh. 6; p. 266, June reconcilement sheet.) The Fidelity Bank suspended payment upon June 21, and at that time was indebted to the Chemical Bank by way of over-draft, after putting to its credit the two loans above mentioned, one of $300,000 on March 2, and the other of $200,000 on June 17, in the sum of $54,938.49. (Rec., p. 105, Armstrong Exh. 6.)

The transactions between Armstrong, as receiver of the Fidelity Bank, and the Chemical Bank.—Armstrong was commissioned as receiver on June 27, 1887 (Rec., Armstrong, p. 85, Q. 2). He seems at once to have taken up the Chemical Bank matter, for on July 6 that bank wrote him, stating specifically the existence of the two loans just above mentioned, and referring to prior correspondence with him (Rec., p. 268). About that time, the account for the June business up to June 20 was forwarded by the Chemical Bank, ex-

amined by Armstrong, and a reconcilement sheet made, and on July 12, a letter was written by him to the Chemical Bank as to differences found on such reconcilement sheet, which was returned with explanations written on its face, as usual (Rec., pp. 266–267). On July 23, and again on August 24, the Chemical Bank advised Armstrong of the payment of two of the notes forwarded as collateral for the March loan (Rec., p. 115, Exh. 6, 7). The Chemical Bank credited these collections and all others upon that collateral, as they came in, to the credit of the account of the Fidelity Bank, and charged that account with the balance of $54,938.49 due on June 20 by way of over-draft as above stated, and with the two loans of March 2, $300,000, and June 17, $200,000, and with sundry other charges, until, on November 26, there appeared a balance to the credit of the Fidelity Bank amounting to $33,809.89, when that balance, with the uncollected collateral or orders therefor, was remitted to Armstrong and the account closed (Rec., p. 115, Watters Exh. 8, 9; p. 35, Quinlan, QQ. 58–65; p. 46, XQQ. 172–183, 200; p. 94, Armstrong Q. 62; pp. 106–111, Armstrong Exh. 7, 8. Mr. Armstrong is mistaken in saying Wilshire's note was not returned; see p. 109, seventh item); this upon the assumption that they had a general lien upon all of the collateral to secure all of the indebtedness. In the meantime, there had been some correspondence between the Chemical Bank and Armstrong upon this matter, which resulted in a letter by Armstrong, dated November 14, 1887 (Rec., p. 24), in which he does not dispute the validity of either of the loans, but does claim that the collateral forwarded in June must be applied solely to the payment of the loan made in that month, and of the over-draft existing after crediting the two loans. To this letter the Chemical Bank responded by two letters, dated November 17 and 18, 1887 (Rec., pp. 100–101), in which

they re-assert their right to a lien upon the entire collateral to secure the entire indebtedness. The letter transmitting the collateral is dated November 25, 1887 (Rec., p. 109, Armstrong Exh. 8). Armstrong answered it by a letter dated November 29 (Rec., p. 111, Armstrong Exh. 9). From the answer, it is evident that the letter transmitted not only the notes there described, but orders for other collateral which had been sent by the Chemical Bank to its attorneys for collection; Armstrong's acknowledgment, as stated in this letter, was without prejudice to his claim previously asserted. Subsequently, by stipulation between Armstrong and the attorney of the Chemical Bank, the residue of the collateral was turned over without prejudice to the rights on either side (Rec., p. 106, Armstrong Exh. 7).

Then followed a suit by Armstrong against the Chemical Bank in the United States Circuit Court for the Southern District of New York, wherein Armstrong sought to recover the surplus of the proceeds of the collateral given in June, 1887, after paying the June loan and over-draft as shown by the bank's books, *i. e.*, with the March loan credited to the Fidelity Bank and unpaid. The Chemical Bank sought to maintain a general lien on all collateral, both March and June, for all indebtedness. Armstrong was successful. (Rec., p. 36, Quinlan, QQ. 73–78.) The decree, rendered in May, 1890, required the Chemical Bank pay him $271,808.34 with interest from May 7, 1890. (Plaintiff's Exh. 7, Rec., p. 26.) The further proceedings in this case are not in evidence; but the opinion of the Court, announced January 2, 1890, may be found in 41 Fed. 234, and 6 L. R. A. 226. On May 22, 1890, the Chemical Bank paid Armstrong the amount due under the decree. (Rec., p. 29.)

Meantime, after the announcement of the opinion of the Court, and shortly after April 3, 1890, the Chemical

Bank presented formal proof of its claim to Armstrong as receiver, asking for an allowance of dividends upon the amount due it at the time of the failure of the Fidelity Bank (Rec., p. 102); to this Armstrong replied by letter dated April 25, 1890, but delivered May 2, 1890, rejecting the claim as tendered upon the ground that collections from collaterals made and to be made should be credited as payments before allowing dividends; and offering to accept a proof for $200,000, and to pay dividends thereon, without prejudice to the right to sue for the balance not allowed, and with the stipulation that should the Court subsequently hold that he was right in his contention, subsequent collections from collaterals should be applied in reduction, and the dividend percentage thereon accounted for by the Chemical Bank to him (Rec., p. 101). This proposition was declined and this suit instituted on May 10, 1890.

Collections by Chemical Bank upon its collaterals. As previously stated, nothing was collected prior to the insolvency of the Fidelity Bank. After that time the Chemical Bank collected at their respective maturities the three notes made by J. W. Wilshire and indorsed by J. V. Lewis, each for $25,000, falling due July 28, August 28, and October 1, 1887 (Rec., p. 37, Q. 79; p. 115, Exhibits 6 and 7). The remaining note of this series, which matured June 28, 1887, is still in its hands and unpaid, no sufficient notice of non-payment having been given to Lewis, the indorser, and the only party to the note then responsible (Rec., pp. 47, 48, QQ. 189–195).

Since this suit was brought the receiver of the Fidelity Bank has accounted to the Chemical Bank for the proceeds of a compromise made by him just previously, and while the securities were in his hands as above men-

tioned, upon the four notes of the Champion Machine Company; the details are not of importance; suffice it to say that as a result the Chemical Bank received in cash on June 2, 1890, $4,481.49; on March 24, 1891, $12.50; and on March 28, 1891, $184.40; and has on hand in addition bonds of Amos Whitely & Co. (successor of the Champion Machine Company) for $2,300, and of Whitely, Fassler & Kelley for $9,600 (Rec., pp. 93–96, 85, 87, 105; N. B., Exh. 5, referred to on p. 105, is printed on p. 87, in answer to Q. 13).

The Chemical Bank also received in March, 1891, $2,917.12 from the trustee for creditors of E. L. Harper & Co., the indorsers upon the fifteen Whitely, Fassler & Kelley notes which were part of the collateral substituted in May (Rec., p. 117). No other cash collections have been made upon the collateral, and what remains on hand may be considered as practically worthless.

Dividends declared to creditors of Fidelity Bank. Dividends to the amount of fifty-eight per cent have been declared to the creditors of the Fidelity Bank as follows (Rec., p. 93, Q. 53; p. 319): October 31, 1887, twenty-five per cent; June 15, 1889, ten per cent; July 30, 1890, ten per cent; August 5, 1891, five per cent; August 15, 1894, eight per cent.

Receiver's suit against the directors. "Armstrong, the receiver, filed a bill against the directors [of the Fidelity Bank on September 18, 1887] to recover compensation for the loss occasioned and made possible by their negligence and failure to supervise Harper's control of the bank. He charged them therein with liability for losses arising from excessive loans made by the bank to Wilshire, Eckert & Co., to Harper's companies, and to Whitely, Fassler & Kelly. He also charged them with permitting Harper, by their negligence, to embezzle more than $500,000, and

from the evidence adduced in support of the averment, it is clear that this charge referred to the transfer of funds by Harper, to his credit, of $700,000, at the time when he had obtained the loans from the First National Bank and the Chemical National Bank of New York. The solvent directors compromised the suit by paying the receiver $450,000, of which Swift, the president, paid $300,000; Chatfield, one director, $100,000; and Pogue & Zimmerman the remaining $50,000. (Rec., pp. 270–301, 206–222.)"

"Armstrong, the receiver, in his bill against the directors, said (Rec., p. 283, § 20):

"'And complainant further avers that the said E. L Harper, vice-president of said association, was permitted by the said directors of said bank to manage the affairs of said banking association and to have charge and control of its moneys and assets without any investigation or control of his management of the business of said banking association.'

"Again, the bill averred as follows (Rec., p. 285, in § 23):

"'Complainant further says that the said E. L. Harper, in connection with the said Ammi Baldwin and Benjamin E. Hopkins, had been theretofore, and for many years prior to the transactions in this petition alleged, engaged in excessive and reckless speculations in wheat and other commodities, and were well known to the president and directors of said association to be excessive and reckless speculators, and wholly unfit to have the charge, management, and control of the moneys, assets, and affairs of the said Fidelity National Banking Association; and complainant avers that by reason of said facts and the knowledge thereof, the said president and directors were put upon inquiry as to the management of the affairs of said banking association, and the safe keeping and investment of its moneys and other properties, during the whole time, during which the money of said association was being loaned and embezzled and misappropriated, as hereinbefore set forth; yet the said president and the said directors, and each of them, in gross and willful disregard of their duty as such directors, wholly failed to exercise the slightest

diligence, or make the slightest investigation of the conduct of the business of said bank; and that any investigation of the affairs of said bank, or examination of its books and of the evidences of indebtedness held by said bank, would have disclosed to the said president, or either of said directors, that the moneys of said bank were being loaned, and liabilities to said bank were being contracted, in violation of the law, and that the affairs of said bank were being mismanaged and its moneys and assets were being embezzled and misappropriated in the manner hereinbefore set forth; and that the exercise of proper care and diligence in the discharge of their duty as president and as such directors, would have prevented the losses described to said banking association.'"

Evidence of banking usage. Upon the second hearing in the Circuit Court, after the decision of this Court in the *Western National Bank* case and the remanding which followed that decision, it was shown by the testimony of bankers in Cincinnati and New York that, prior to that decision, it was usual, and an ordinary incident in the banking business, for one bank to borrow from another; that by custom and usage it was within the scope of the authority of each of the executive officers of a bank, president, vice-president, if actively engaged, and cashier, to make application for such a loan, and it was never considered necessary for them to submit proof of their authority so to do; and that the loan would be made either by re-discounting negotiable securities offered by the borrowing bank, or by a loan with such securities as collateral, or at times without security. We shall have occasion hereafter to quote some of this testimony, and in that connection will mention more particularly the qualifications of the different witnesses. It is enough here to refer to the summary of their testimony given by the Court below (Rec., pp. 334–337), and to say that they were executive officers of some of the most prominent banks in New York and Cincinnati, and that their testimony stands entirely

uncontradicted, the receiver not having called a single witness upon this subject, or to show that the directors of the Fidelity Bank were not fully aware of this usage.

ARGUMENT.

We have been thus particular and minute in detailing the facts of the case that the Court might be made fully aware at the outset how different the state of affairs presented by this record is from that which was presented in *Western National Bank* v. *Armstrong*, 152 U. S. 346; and that even should your honors be disposed to adhere to the definition of the banking business given in that opinion, yet you should see at the threshold of your consideration of the case at bar that, whatever might be thought as to to the authority of Harper and Baldwin to negotiate the loan here in question, the assets of the Fidelity Bank were plainly responsible for the money lent on the ground either of ratification of the loan made in fact or conclusively presumed by estoppel, or of that bank having used the money which the appellee lent.

But while thus maintaining that the decree below can and should be affirmed consistently with that opinion as it stands, yet because we believe that opinion to be a departure from principles of law theretofore considered well settled, and, if adhered to, likely to cause trouble and confusion in the banking business, we invite the Court to a reconsideration of it, and therefore shall first discuss the nature of the business of banking.

I. POWER OF BANKS TO BORROW.

As a rule wherever money is to be used in a business there the borrowing of money is incidental to that business. Because of this the doctrine is well settled that all commer-

cial corporations have an implied power to borrow money. Morawetz on Corporations, sec. 342; 4 Thompson on Corporations, sec. 5697. This doctrine has been affirmed by this Court in *Railroad Company* v. *Howard*, 7 Wallace, 392, 412, in the following words:

"Private corporations may borrow money, or become parties to negotiable paper in the transaction of their legitimate business, unless expressly prohibited; and until the contrary is shown, the legal presumption is that their acts in that behalf were done in the regular course of their authorized business."

The question here is whether this doctrine and this presumption apply to banks. Undoubtedly they are borrowers of money in the course of their business; indeed the primary object of their business is to borrow money. For their circulating notes merely represent loans to them of specific sums payable upon demand; and their deposit accounts are also but loans payable upon demand in sums desired by the depositor. *Phœnix Bank* v. *Risley*, 111 U. S. 125; *State* v. *Bartley*, 39 Neb. 353; 23 L. R. A. 67. These are the every day business of the bank; and without one or the other of them it would die of dry rot. So the question here involved is not whether borrowing money in this way is incidental to banking, but assuming that it is whether any other kind of borrowing is so incidental; in brief, whether it is a recognized part of the banking business to hire money; to obtain it on time, or with the understanding that it shall not be immediately withdrawn, and to pay for its use.

We submit that transactions of this nature have always been considered a legitimate and ordinary part of the banking business. In proof of this we shall call as witnesses legislation that has been passed creating banks,

well informed writers upon the banking business, judicial opinions by Courts of the highest standing, and the uncontradicted sworn testimony of bankers of the present day. We had made very full citations from works on banking, and reported decisions upon this subject in our brief filed in the Court below. Counsel for defendant in error in Case No. 206, on the docket of this Court for this term, *H. F. Auten as Receiver of the First National Bank of Little Rock, Arkansas*, v. *United States National Bank*, have honored us by quoting *verbatim* that portion of our brief; and as that case will, in the ordinary course of events, be heard before this so that the Court will be familiar with the matter there quoted, we shall not here repeat all of the citations we made below. We shall abridge those there used, preserving their most salient points; and to them we shall add others of which we made no use below.

LEGISLATION.

The earliest statute recognizing such borrowing as a part of the banking business was passed in 1670, 22 and 23 Charles II; we have not access to the original statute, but we find the following quotation from it in vol. I, p. 541, of *Lex Mercatoria* by Wyndham Beawes (Joseph Chitty's edition, published in 1813):

"Whereas, several persons being goldsmiths, and others, by taking up or borrowing great sums of money, and lending out the same again for extraordinary hire and profit, have gained and acquired to themselves the reputation and name of bankers, etc."

Next is the noted act of 1694 establishing the Bank of England, 5 & 6 W. & M., c. 20. This act nowhere in terms conferred the power to borrow money; but its existence was recognized by the limitation which was put upon

it in section 26, by which the bank was forbidden to borrow more than the amount of its capital, in the following terms:

"That the said corporation so to be made, shall not borrow or give security by bill, bond, covenant or agreement under their common seal for any more, further or other sum or sums of money, exceeding in the whole the sum of twelve hunded thousand pounds, so that they shall not owe at any one time more than the said sum, unless it be by act of parliament upon funds agreed in parliament; and in such case only such further sums as shall be so directed and allowed to be borrowed by parliament, and for such time only, until they shall be repaid such further sums as they shall borrow by such authority." And if this limitation be exceeded, that the stockholders shall be responsible for the excess *pro rata*.

It will be observed that the words of obligation here mentioned are not confined to those which would create indebtedness merely by a bank note or a bank deposit, but extend beyond and cover every kind of liability, and that they imply not merely demand loans, but loans on time. If one could be in doubt as to this on reading the section, such doubt would be removed by reading the first act in which parliament gave power to borrow a further sum, section 30 of the act of 1697, 8 & 9 William III., c. 20; for this, after reciting the section just mentioned, gave power to borrow an additional sum of money by bills or agreement under their common seal, with the proviso, however, that—

"The said governor and company do oblige themselves in their said bills, by them to be given out, to answer and pay the money therein mentioned upon demand."

Section 28 of the act just mentioned declared that no other bank, or institution in the nature of a bank, should be countenanced by parliament during the existence of the

Bank of England. Ten years later, in section 9 of the act of 6 Anne, c. 22, this provision was recited, and the section continues:

"*Nevertheless since the passing of the said act some corporations by colour of the charters to them granted, and other great numbers of persons, by pretence of deeds or covenants united together, have presumed to borrow great sums of money, and therewith, contrary to the intent of the said act, do deal as a bank, to the apparent danger of the established credit of the kingdom:* now for preventing of such practice in time to come, and the mischiefs thence to arise, be it enacted by the authority aforesaid, That from and after the twenty-ninth day of *September*, in the year of our Lord seventeen hundred and eight, during the continuance of the governor and company of the bank of *England*, it shall not be lawful for any body politick or corporate whatsoever, erected, or to be erected, other than the said governor and company of the bank of *England*, or for other persons, whatsoever united or to be united in covenants or partnership, exceeding the number of six persons, in that part of *Great Britain* called *England*, to borrow, owe, or take up any sum or sums of money on their bills or notes, payable at demand, or at any less time than six months from the borrowing thereof."

The enactment just mentioned, with modifications, has since been continued in force, and is generally said to be *the banking franchise* of the Bank of England. It will be noted that the prohibition is not merely as to demand notes and bills, but as to any notes and bills having less than six months to run, thus conclusively showing that the issue of time paper, and consequently the borrowing of money on time, was then, and has since been, considered a natural feature of the banking business.

Section 39 of an act passed in 1716, 3 George I, c. 8, enlarged the borrowing powers of the Bank of England,

and removed from such loans the restrictions of the usury laws, in the following terms:

Section 39. "And it is hereby enacted, that the said governor and company of the bank of *England*, or their successors, shall have power and authority, and they are hereby enabled, in case they shall think fit, from time to time, and at any time or times, at their own good liking, to borrow or take up money upon any contracts, bills, bonds or obligations, under their common seal, or upon credit of their capital stock or stocks, or any part thereof, or otherwise, for any time, or to be paid upon demand, and at such rates of interest, or upon such terms as they shall think fit, although the same shall happen to exceed the interest allowed by law to be taken, and to give such security for the same, as shall be to the satisfaction of the lenders respectively; any former law, statute, prohibition, restriction, clause, matter or thing whatsoever to the contrary notwithstanding."

Passing now to this country, we ask attention to the act approved February 25, 1791, incorporating the first Bank of the United States with a capital of $10,000,000, 1 U. S. Stat. at Large, 191. Paragraph 9 of section 7 was modeled upon section 26 of the Bank of England act of of 1694; but it contains a modification that is noteworthy. It reads:

"The total amount of the debts, which the said corporation shall at any time owe, whether by bond, bill, note, or other contract, shall not exceed the sum of ten millions of dollars over and above the moneys then actually deposited in the bank for safe-keeping, unless the contracting of any greater debt shall have been previously authorized by a law of the United States." Yet, if the limitation were exceeded, the corporation was liable, and its non-dissenting directors as well.

By thus restricting the right to borrow its existence is

necessarily recognized. The restriction is not upon the indebtedness created by deposit with the bank, for that is expressly excepted; nor is it limited to its circulating notes, for the words of obligation extended beyond those and include *bond*, bill, note, or *other contract*. Its paper of circulation was the notes mentioned in paragraph 13 of section 7 (to which we shall advert more particularly shortly, in connection with the act of 1816), as well as paragraph 9; the words *bond and other contract* in paragraph 9 refer to other kinds of indebtedness, that is to say, to the borrowing of money in other ways for the use of the bank.

The act approved April 10, 1816, creating the second Bank of the United States, with a capital of $35,000,000, 3 U. S. Stat. at Large, 266, was even more explicit. Paragraph 8 of section 11 was like paragraph 9 of section 7 of the act just mentioned, *mutatis mutandis*. Paragraph 12 of that section is substantially the same as paragraph 13 of section 7 of the earlier act, with the exception that it adds two provisos which serve to explain the nature of the earlier enactment, and to make it still more apparent that power was given to the bank to borrow money on time for use in its business. We print paragraph 12 as it is found in the act of 1816, italicising the words in the latter act which are not found in paragraph 13 of section 7 of the act of 1791, and adding in brackets words in that paragraph which are not found in paragraph 12 of section 11 of the act of 1816:

"*Twelfth*. The bills, obligatory and of credit, under the seal of the said corporation, which shall be made to any person or persons, shall be assignable by endorsement thereupon, under the hand or hands of such person or persons, and his, her, or their *executors or administrators, and his, her or their* assignee or assignees, and so as absolutely to transfer and vest the property thereof in each and every

assignee or assignees successively, and to enable such assignee or assignees, *and his, her or their executors or administrators*, to [bring and] maintain an action thereupon in his, her, or their own name or names: *Provided, That said corporation shall not make any bill obligatory, or of credit, or other obligation under its seal for the payment of a sum less than five thousand dollars.* And the bills or notes which may be issued by order of the said corporation, signed by the president, and countersigned by the principal cashier or treasurer thereof, promising the payment of money to any person or persons, his, her or their order, or to bearer, *al*though not under the seal of the said corporation, shall be binding and obligatory upon the same, in [the] like manner, and with [the] like force and effect, as upon any private person or persons, if issued by him, *her* or them, in his, her or their private or natural capacity or capacities, and shall be assignable and negotiable in like manner as if they were so issued by such private person or persons; that is to say, those which shall be payable to any person or persons, his, her or their order, shall be assignable by endorsement, in like manner, and with the like effect as foreign bills of exchange now are: and those which are payable to bearer shall be assignable and negotiable by delivery only: *Provided, That all bills or notes, so to be issued by said corporation, shall be made payable on demand, other than bills or notes for the payment of a sum not less than one hundred dollars each, and payable to the order of some person or persons, which bills or notes it shall be lawful for said corporation to make payable at any time not exceeding sixty days from the date thereof.*"

The seventeenth paragraph of section 11 of the act of 1816 contained another provision the like of which is not found in the act of 1791, viz.: "*Seventeenth.* No note shall be issued of less amount than five dollars." The changes in current legal phraseology since those acts were written call for a few observations. The first part of paragraph 13 of section 7 of the act of 1791, and its equivalent in paragraph 12 of section 11 of the act of 1816, relating to bills

obligatory and of credit under the seal of the corporation, was borrowed almost *verbatim* from section 29 of the act creating the Bank of England, 5 and 6 W. & M., c. 20. In the course of time the words *bill obligatory* have almost vanished from common use. Such an instrument was what we now call a single bond, that is, an instrument under seal reciting an obligation to pay money without condition or penalty. Thus Lord Coke says, Co. Litt. 172:

"Obligation is a word of his own nature of a large extent; but it is commonly taken, in the common law, for a bond containing a penalty, with condition for payment of money, or to do or suffer some act or thing, etc., and a bill is most commonly taken for a single bond without condition."

In Jacob's Law Dictionary, in defining the word *obligation*, the passage just quoted is referred to, being preceded by the following:

"A bond, containing a penalty, with a condition annexed for payment of money, performance of covenants, or the like; it differs from a bill, which is generally without a penalty or condition, though a bill may be obligatory."

And in Anderson's Law Dictionary, under the word *bill*, it is said:

"Bill: bill obligatory, bill penal, bill single, a bond without a condition. An instrument acknowledging indebtedness in a certain sum to be paid on a day certain. Differs from a promissory note in having a seal affixed. 'Bill obligatory' has a seal."

So in *Farmers, etc., Bank* v. *Greiner*, 2 S. & R. 114, Chief Justice Tilghman said in the year 1815:

"Bills of exchange and bills obligatory are very different things. . . . A bill obligatory is an instrument in

common use and too well known to be misunderstood. It is a bond without a condition, sometimes called a single bill, and differing from a promissory note in nothing but the seal which is annexed to it."

With this definition in mind, the object of the provision last quoted from the acts creating the two banks of the United States becomes clear. The first half, relating to bills obligatory and of credit, refers to obligations under seal, given for money borrowed, and restricted by the second act to large sums. The second half relates to commercial paper—not merely to ordinary bank notes, but to all negotiable instruments, because it refers to instruments payable to order as well as to those payable to bearer—and to those payable on time as well as to those payable on demand. As the act was intended to operate throughout the United States, and as the statute of Anne, which put promissory notes upon the footing of bills of exchange, was not operative in all of the states, it was necessary to enact that notes as well as bills should be negotiable. But post-notes and post-bills, in other words, time obligations, were required to be payable to order and not bearer, and to be for a sum of at least one hundred dollars. Thus power was given to these banks, not merely to borrow money by issuing circulating notes, but to borrow upon all the recognized instruments of commerce, and in any amount and on any time, the only restriction being that if the loan were on time the instrument must run to a named person or his order, and not merely to bearer, and must be for a loan of at least one hundred dollars: and if the time were longer than sixty days, the instrument was assignable merely and not negotiable, and must assume the more solemn form of a sealed obligation, and be for not less than five thousand dollars.

The failure of the United States Bank of Pennsylvania, which grew out of the ashes of the second Bank of the United States, and the panic of 1837, led the legislatures of several of the states to adopt general laws for the formation of banks. The model of these was the Free Banking Law of New York, passed in 1838. This contained no express legislation as to borrowing; but, as we shall point out when we come to mention the judicial opinions, that power was held to be conferred thereby.

Chapter 36, of the Revised Statutes of Massachusetts, passed November 4, 1835, contains the general banking law of that state. Sections 9 and 10 of that act read as follows:

"IX. The total amount of debts, which any bank shall at any time owe, shall not exceed twice the amount of its capital stock, actually paid in, exclusive of sums due on account of deposits not bearing interest; nor shall there be due to such bank, at any time, more than double the amount of its capital stock actually paid in.

X. Debts due to any bank from any other bank, including bills of the bank so indebted, shall not be deemed debts due to a bank, within the intent and meaning of the preceding section."

These provisions, it will be noted, are modeled upon the acts of Congress just mentioned, but enlarge the power by excluding from the limitation not only deposits not bearing interest, but moneys owing to another bank. Sections 11–13 make the bank and non-dissenting directors liable for loans in excess of the limitation. This act thus not only recognizes the power of a bank to pay interest upon deposits, but to borrow from other banks in other ways than by receiving money on deposit from them.

Section 56, of the Ohio "act to incorporate the State Bank of Ohio and other banking companies", passed

February 24, 1845, 1 Swan & Critch. Rev. Stat. 137, reads as follows:

"Sec. LVI. No banking company deriving any of its powers or privileges from this act, shall at any time be indebted, or in any way liable, to an amount exceeding, if a branch of the State Bank of Ohio, two-thirds, or, if an independent banking company, the whole amount of its capital stock at such time actually paid in, and remaining as capital stock, undiminished by losses or otherwise, except on the following accounts, that is to say:

First. On account of its notes of circulation;

Second. On account of moneys deposited with, or collected by, such company.

Third. On account of bills of exchange or drafts drawn against money actually in deposit to the credit of, or due to, such company;

Fourth. Liabilities to its stockholders on account of money paid in, on capital stock and dividends thereon."

The same limitation was incorporated in section 20 of the Ohio "act to authorize free banking", passed March 21, 1851, ibid. 171.

The sections just mentioned are notable as they were familiar to Mr. Chase, who was secretary of the treasury when the National Banking Acts were passed, and largely instrumental in securing their passage, and as their substance was introduced into those acts, as will be noted *infra*. Further comment upon them is postponed until that time.

WORKS ON BANKING.

We have already referred to "Lex Mercatoria" by Wyndham Beawes. This was a standard work of the last century. Its value survived to this century, for the sixth edition was published in 1813, and edited by Joseph Chitty. In the chapter treating of banks he classifies them according as they are managed by the public authorities, or by

an association in the nature of a joint stock company, or as a purely private enterprise. As to the joint stock banks, he says, page 513 (*italics* ours):

"A second sort of banks is such as consist of a company of moneyed men, who being duly established and incorporated by the laws of their country, agree to deposit a considerable fund or joint stock, to be employed for the profit and advantage of the whole society, in all those ways which are compatible with the nature of such an undertaking; *as borrowing upon their own credit;* and lending money upon good securities; buying and selling bullion, gold and silver, and foreign specie; discounting of bills of exchange, or other secure debts; receiving and paying the cash of other persons; and of this kind is the Bank of England."

The most valuable and thorough work of this century upon banking as a commercial business is that of J. W. Gilbart, F. R. S., originally published in 1829 under the name of "A Practical Treatise on Banking," but in more recent editions called "The History, Principles and Practice of Banking." Mr. Gilbart was probably the most successful and accomplished banker in England of his day. He was the originator, and for many years the manager, of the London and Westminster Bank, the first of the joint stock banks formed in London. In the fifteen years from its organization in 1834 until 1849, under his management, that bank had accumulated a surplus of over half a million dollars, after paying regular dividends at the rate of four, five, and six per cent. Under the leadership of Mr. Gilbart this bank undertook to accept bills of exchange, which led to a contest with the Bank of England as being an infringement upon its vested rights, in which position the latter was ultimately sustained by the House of Lords; see *Bank of England* v. *Anderson*, 2 Keen, 328; 3 Bing. N. C.

589; and *Booth* v. *Bank of England*, 2 Keen, 466; 7 Clark & Fin. 509; but this right was subsequently given to the joint stock banks by statute. (See Lawson's History of Banking, 1st American edition, edited by J. Smith Homans, and published by Gould & Lincoln in 1852, pages 183–185). We mention these matters simply to show the very great practical familiarity of Mr. Gilbart with the subject on which he writes. His book has gone through many editions, some of which are quite recent—of itself testimony of the greatest weight as to its value; and it has always been cited with respect and as authoritative by others who have followed him in this field of investigation or in parts of it. From the edition of 1882, revised by A. S. Michie, deputy manager of the Royal Bank of Scotland, we quote as follows:

Vol. I, page 13: "The exchanging of money; the lending of money; the borrowing of money; the transmitting of money, are the four principal branches of the business of modern banking, and in most countries they seem to have taken their rise in the order in which they are here named."

Vol. I, page 23: "That part of the business of banking which consists in the borrowing of money, with a view of lending it again at a higher rate of interest, does not appear to have been carried on by bankers until the year 1645, when a new era occurred in the history of banking. The goldsmiths, who were previously only money-changers, now became also money-lenders. They became also money-borrowers, and allowed interest on the sums they borrowed."

Vol. I, pages 127, 128: "Banking is a kind of trade carried on for the purpose of getting money. The trade of a banker differs from other trades, inasmuch as it is carried on chiefly with the money of other people.

"The trading capital of a bank may be divided into two parts: the invested capital and the banking capital.

The invested capital is the money paid down by the partners for the purpose of carrying on the business. This may be called the real capital. The banking capital is that portion of capital which is created by the bank itself in the course of its business, and may be called the borrowed capital." . . .

"The profits of a banker are generally in proportion to the amount of his banking or borrowed capital. If a banker employ only his real or invested capital, it is impossible he should ever, in the ordinary course of business, make any profits. Bankers can seldom attain more upon their advances than the market-rate of interest; and that may be obtained upon real capital, without the expense of maintaining a banking establishment. If, after deducting the expenses, the profits amount to nothing more than the market-rate of interest upon the invested capital, the bank may be considered to have made no profits at all. The partners have received no higher dividend upon the capital invested in the bank than they would have received if the same money had been laid out in government securities. To ascertain the real profit of a bank, the interest upon the invested capital should be deducted from the gross profit, and what remains is the banking profit."

Vol. I, page 248: "The rediscounting of bills of exchange is an operation of much importance, and has a great influence on the monetary operations of the country. We quote from a former work of our own, *i. e.*, 'The History of Banking in America,' upon this subject: 'Banks situated in agricultural districts have usually more money than they can employ. Independently of the paid-up capital of the bank, the sums raised by circulation and deposits are usually more than the amount of their loans and discounts. Banks, on the other hand, that are situated in manufacturing districts, can usually employ more money than they can raise. Hence, the bank that has a superabundance of money, sends it to London, to be employed by the bill brokers, usually receiving, in return, bills of exchange. The bank that wants money sends its bills of exchange to London, to

be rediscounted. These banks thus supply each other's wants, through the medium of the London bill brokers.'"

(It will be remembered that the bill broker in London is an intermediary between the borrower and the lender. In the cases referred to by the author, he is the chain of connection between the borrowing and the lending banks.)

More than fifty years before Mr. Gilbart first published his book Adam Smith had stated that it was a common thing for the Scotch banks to borrow from their London correspondents when their supply of money was insufficient to meet the demand. We quote from "Wealth of Nations," Book II., c. 2. After stating that the Scotch banks, from an excess of circulation, were obliged to keep an agent at London to collect money for them and send it by carrier, he continues:

"Those agents were not always able to replenish the coffers of their employers so fast as they were emptied. In this case the resource of the banks was, to draw upon their correspondents in London, bills of exchange to the extent of the sum which they wanted. When those correspondents afterwards drew upon them for the payment of this sum, together with the interest and a commission, some of those banks, from the distress into which their excessive circulation had thrown them, had sometimes no other means of satisfying this draught but by drawing a second set of bills either upon the same, or upon some other correspondents in London; and the same sum, or rather bills for the same sum, would in this manner make sometimes more than two or three journeys; the debtor bank, paying always the interest and commission upon the whole accumulated sum."

The "History of Banking," by William John Lawson, was published in London in 1850. It is not an essay upon and inquiry into the business of banking like Gilbart's;

but it fully merits the claim made for it by the author in the preface of "being an extensive collection of facts connected with the banking system," and intersperses those facts with anecdotes of a very entertaining nature. The edition from which we quote is the first American edition, referred to p. 39, *supra*.

In c. 7, "On London Banking," at p. 106 of that edition, the author, having alluded to the superseding of the Jews, the earliest English bankers, by the Lombards, and of the latter in the early part of the seventeenth century by the goldsmiths, and to a change in method by the latter, continues (*italics* ours) :

"The change consisted in the lending of money by the latter on personal credit, and at a moderate rate of interest compared with that charged by their predecessors. They also issued promissory notes, payable on demand *and at fixed periods, bearing interest*. Such notes were called 'goldsmiths' notes.'"

This practice was evidently continued by the Bank of England in its early history, as will appear from *ibid.*, pp. 43 and 44 in c. 4, on the "Foundation of the Bank of England." The statement of the condition of the bank on November 10, 1696, given to the House of Commons and there quoted, and the comments of the author, make this manifest, and show furthermore that the bank was then indebted in 300,000 pounds for moneys borrowed in Holland.

In c. 8, "On Country Banking," at p. 156, the author says :

"Most bankers in the country carry on their business of borrowing or receiving money at interest, as well as lending upon securities, and they thereby form a connecting link in the chain between the operative and inoperative classes ; they become the debtors of the capitalists and the creditors of the producers or distributors of revenue, and

thus afford a ready medium of adjustment between the interests of these two great divisions of society."

In c. 11, "On Scotch Banking," at p. 236, the author says:

"All the Scotch banks have an original subscribed capital of their own: they receive deposits from the public, for which they allow interest, and they issue notes of all denominations from one pound and upwards."

In 1847, there was published in London a book called "Capital, Currency and Banking," by James Wilson, Esq., M. P., being a republication of a series of articles printed in the "Economist" in 1845 and 1847. We quote from article 3, page 26:

"As a general rule, the independent capital of bankers constitutes but a very small portion of the means upon which they trade. As we have before observed, bankers are rather the medium through whom the capital of others is lent and borrowed than dealers in their own capital. The private and independent paid-up capital belonging to banks may be looked upon rather in the light of a guarantee to the public for their security against the risk which it is known bankers must incur in the use of the deposits placed in their hands, than as constituting any very important portion of their means of trading.

"A banker being essentially, in the first place, a borrower of money, returnable on demand, the great art of his profession is to employ those funds in such a way as will at all times and under ordinary circumstances, enable him to meet such demands."

Page 32: "The practice of banks [in London] not allowing interest on deposits has at length changed the character of the bill-broker to that of a banker, taking deposits (money at call), at a given rate of interest, from one man to lend it by discounting bills at a higher rate of interest to others. At the same time that he acts as a medium

for transferring spare capital which accumulates with banks in one part of the country to those in other parts, where trade and commerce create a greater demand for it."

Also from article 4, page 36. "The business of a banker is to borrow and lend."

G. M. Bell, Secretary of the London Chartered Bank of Australia, has published a little book called "The Philosophy of Joint Stock Banking." We quote from the second edition, published in 1855, from Chapter 10, entitled, "On Rediscounting." After stating that rediscounting is common, and arguing against it as a habit, the author continues, page 69 (*italics* ours):

"It is well known that banks in the agricultural districts accumulate capital by deposits and circulation, for which they can find no other employment than by sending it to the London bill-brokers, or investing it in the funds. It is equally well known that banks in the mining and manufacturing districts have demands upon them for accommodation out of proportion to their capital, which they can not otherwise supply than by having recourse to the system of rediscounting with bill-brokers. This latter class derive their profits from the difference of interest on the money borrowed and lent between the banks in this way. The borrowing bank, therefore, pays an extra charge, which by a different arrangement might be avoided, and both parties be equally well accommodated. The arrangement here suggested is that *one bank should lend direct to another* without the intervention of a broker. The bank that borrows money from its depositors at two per cent could very profitably lend to its neighbor at two and a half or three per cent, more or less, in proportion to the ever-changing value of money."

In 1885 there was published by John Murray, of London, the second edition of a book called "The Country Banker, His Clients, Cares and Work, from an Experience

of Forty Years," by George Rea, author of "Bullion's Letters to a Bank Manager." We quote from page 218:

"*Rediscounting.*—The rediscount, or sale of a portion of its bills, is often an important feature in the financing of an English country bank."

The author then proceeds to state some of the objections to this practice, and continues:

"But the objections which apply to banks having ample resources within themselves do not apply to banks placed in districts of great industrial activity, where deposit money is scarce and the demand for loan capital is great. There is nothing opposed to sound banking principle in banks thus placed supplementing their resources by rediscounting portions of their bills, and thus drawing supplies from the London market. A bank, by this process, merely transfers that portion of its discount business to London which is in excess of its local means to meet it."

Mr. Walter Bagehot, in "Lombard Street" (edition of 1873, published by Scribner, Armstrong & Co., N. Y.), says:

Page 243. "A banker's business—his proper business—does not begin while he is using his own money; it commences when he begins to use the capital of others."

On page 285 he quotes from the testimony given by Mr. Richardson in 1810 to the Bullion Committee of Parliament, as to the nature of an agency for country banks: "'It is two-fold; in the first place, to procure money for country bankers on bills when they have occasion to borrow on discount, which is not often the case; and in the next place, to lend the money for the country bankers on bills on discount. The sums of money which I lend for country bankers on discount are fifty times more than the sums borrowed for country bankers.'"

On page 287 Mr. Bagehot says: "For the most part agricultural counties do not employ as much money as they

save; manufacturing counties, on the other hand, employ much more than they save; and therefore the money of Norfork or of Somersetshire is deposited with the London bill-brokers, who use it to discount the bills of Lancashire and Yorkshire."

From the quotations we have made thus far from English works it would be inferred that while it was common for the English country banks and the Scotch banks to pay interest upon deposits, and thus hire money in the strictest sense, yet this was unusual among London banks. The latter ceased to be true about fifty years ago, and since then it seems to have been a common thing for even the best managed of the joint stock banks and private banks of London to pay interest upon deposits. To show the present nature of the business of banking as understood in England we quote from the article on "Banking" in the last edition of the Encyclopedia Britannica as follows:

"It will be convenient here to give a general sketch of the nature of the business of an ordinary banker. We have said he receives and lends money; he may receive money either on a deposit or on a current or drawing account. When money is received on deposit it is commonly repayable to the depositor alone, to whom a deposit note or receipt is given; but it may also be paid to any one to whom the depositor gives an order on the bank either endorsed on the deposit note or receipt or accompanying it. If the banker undertakes to pay interest on deposits, the rate varies according to the length of the notice the depositor agrees to give before withdrawing the money, the ability of the banker to deal with it being, of course, dependent upon the time he may rely upon keeping it. When money is received on a current or drawing account, the customer of the banker draws it out, as he requires, by means of orders, to which the specific name cheques is given.

"We have elsewhere hinted at the subdivision of the

business of banking which has accompanied the development of commerce. A banker borrows and lends money, but the conditions under which money is borrowed or lent may be extremely various, and the different classes of bankers are distinguished from one another by difference in the rules which they observe in borrowing or lending. Bankers may borrow on call, at deposit, on debentures, at interest, or without interest, and they may lend on open credits, by discounting bills, by advances on mortgages repayable in installments or otherwise, etc., etc."

The article then specifies as the various kinds of banks: Banks of deposit which borrow upon time certificates bearing interest, of which Land Mortgage Banks, lending on real estate mortgages, and Credit Companies, lending on industrial enterprises, are species; Discount Banks, as to which it says:

"Discount banks and discount agencies borrow money on call or deposit, and lend it exclusively in the discount of bills and negotiable securities, which they often rediscount with capitalists desirous of investing their money in forms capable of being speedily realized."

Trust Companies which borrow on debentures and invest in foreign loans and similar securities; and Savings Banks which gather in the smaller savings of the poor.

After alluding to the fact that the Bank of England does not allow interest upon deposits, and quoting from the evidence of Mr. Weguelin, a former Governor of that bank, before a committee of parliament in 1857 defending this practice, the article comments upon his testimony as follows:

"He says nothing to explain why they," the directors of the bank, "should not, as the managers of a joint stock company, use every means of profitably extending their business, and it is incontestable that if the bank directors

offered to receive deposits at interest, the reputation of the bank would enable them to defy the competition of the other joint stock banks. The truth is, that the non-allowance of interest is a tradition, of no authority in itself, and operating injuriously in keeping up the delusion that the banking department of the Bank of England is an institution differing essentially in the character of its business from other banks."

Turning now to a work written in this country, we call attention to "The Methods and Machinery of Practical Banking," by Claudius B. Patten, of Boston, Mass., published in 1891. From the preface, it appears that Mr. Patten had been for twenty years, prior to 1867, connected with the Suffolk Bank of Boston; that in that year he became cashier of the State National Bank of that city, where he continued until his death in 1886; and that the book is a compilation by his successor of sundry articles published during his life in the Journal of Banking.

On page 355 he gives this statement as to the clearing house loans which were such a feature in the case of the *Merchants' Bank* v. *State Bank*, 10 Wallace, 604:

"LOANS BETWEEN BANKS AT CLEARING.

"In some of our clearing house cities, notably in Boston, the banks are in the habit of borrowing of each other, as their situation may demand, immediately after they have made their morning settlements. These negotiations are, of necessity, made by the representatives of the banks who are present at the clearing. And these representatives are mainly the messengers and settling clerks of the banks, though it has of late years become the custom with many banks to be present at these morning after-clearing negotiations in the person of their cashier.

"This custom has been in existence for at least twenty years, and the aggregate of loans of this class made there daily is very large, ranging from hundreds of thousands to

millions of dollars. I have known many instances where banks, which have emerged from the morning settlements with gains of more than a million, have, before leaving the clearing house, scattered these entire gains in loans among losing banks—loans negotiated on both sides by single representatives of the banks, and those often junior clerks. There is nothing of this sort done in the European clearing houses.

"I found the London bankers interested and astonished to hear that we indulged in financial transactions of this character.

"The loans made at clearing are loans of minute money. They are rarely secured by deposit of collateral of any sort.

"The bank receiving the accommodation draws upon the lending bank a check in its usual form. The loan is charged to it; and, when it is repaid, the lending bank settles the transaction by simply drawing upon the debtor bank for the amount.

"The current rates for these loans are usually about one per cent under those charged upon standard call loans to private bankers and merchants. This is because they are loans for large round sums, ranging say from ten thousand to hundreds of thousands of dollars, and because the money thus advanced is understood to be immediately available in the form of clearing house funds."

On page 406, he says:

"Shall national banks become dealers in money, or shall they simply bank upon the capital furnished them by their shareholders, unhired depositors, and bill holders? There is no banking question of the period of more vital interest than this, and none which is being more actively discussed.

"There is no doubt but that some of the most successful banks in the United States—banks which have paid the largest kind of dividends, and which to-day show a heavy surplus and a current business of the most profitable charac-

ter—are those which have been run upon a moderate share capital and large interest-paid deposits. These banks have bought money in all directions, paying comparatively heavy prices for it, and have sold the same at a very slight advance. Yet the magnitude of their transactions has so swollen their profits that their small capitals have reaped the largest remuneration. This is doing business on the London joint-stock bank principle—a principle which has in London been worked with marvellous success. The leading London banks in question carry deposits, upon which heavy interest is paid, to the amount of from ten to twenty times their capital. Their dividends have for many years been enormous, and their shares to-day sell, in some instances, at two or three times their par value.

"Banks which deal in money to the extent which I have described and which carry the limited share capital, have need only of making a very small percentage on the money they handle in order to earn a large dividend for their share capital. The motto of such institutions is large sales and small profits, yet the net results are most satisfactory."

JUDICIAL OPINIONS.

Many of the cases in which the power of banks to borrow money has been discussed involved also the authority of the agent through whom the loan was effected. Such cases will be noticed *infra* under other heads of this argument; and to them we refer without repeating here. The cases to which we now invite the attention of the Court are principally those in which it was contended that borrowing was not a legitimate part of the banking business, and therefore, that a bank had no power to borrow money where that power was not expressly given by its charter. This question was presented to the Privy Council in England and to the courts of last resort in New York and Illinois in three cases of great importance. In each of these cases the nature of the banking business and of the

transactions incident to it were carefully examined; and for this reason they deserve to be stated with some particularity of detail.

The first of these in time is the case of the *Bank of Australasia* v. *Breillat*, 6 Moore P. C. C. 152, decided by the Privy Council in December, 1847. The facts, so far as necessary to state them for our present purpose, were as follows: The Bank of Australasia was a partnership doing business at Sydney, in New South Wales. The Bank of Australia was a joint stock company, incorporated under a special act, doing business at the same place; the defendant, Breillat, was the chairman of the Bank of Australia, and the nominal defendant, under statutory provisions, in suits brought against it. The deed of settlement, which constituted the charter of the Bank of Australia, put the control of its business in a board of directors, and declared that business to be the discount and issue of notes and bills, the lending of moneys on securities, and cash accounts for the safe custody of moneys and securities for moneys, for general public accommodation and benefit, and transacting and negotiating all other matters usually connected with the ordinary business of banking; and by clause 54 it declared the board of directors should have entire control of the lending of money on bills, notes, etc., the purchase and sale of bullion, gold and silver, and such coins and moneys as they might think necessary or advisable, and of calling in all moneys due the company. The Bank of Australia, early in 1843, having become involved in difficulties, applied to the plaintiff for assistance. This was given in the form of a loan of £154,000 sterling upon certain conditions involving, among other things, the winding up of the banking business of the Bank of Australia. In October, 1843, the Bank of Australia gave its demand note for the sum thus lent. In

August, 1844, the share holders in the Bank of Australia declared this note was not binding on that bank, and instructed the directors to defend any action brought to recover on the same. Thereafter this suit was brought upon the note. The committee of the Privy Council who sat in judgment were Lord Brougham, Lord Langdale, Lord Campbell, Dr. Lushington, and T. Pemberton Leigh. The opinion of the committee was delivered by the latter. Having stated the facts and the issue, and described the nature of the powers given to the board of directors, he continues, page 193:

"The effect, we think, is to confer on these directors all the powers of managing partners in ordinary partnerships of a similar character, unless there is something in the subsequent clauses of the deed restricting those powers.

"First, then, is the power of borrowing money for the purposes of the partnership, one of the powers which belong to a partner in ordinary banks? And, secondly, if so, is there any restriction expressed, or to be inferred, from the deed?"

Then, having quoted with approval sections 124 and 125 of Story on Agency as to the powers of partners, and having shown that borrowing money for partnership purposes is unquestionably one of those powers, he continues, page 194:

"Then, is the nature of a banker's business such as to exclude the power, from want of occasion of its exercise? Quite the contrary. The nature of a banker's business, especially if the bank be one of both issue and deposit, necessarily exposes him to sudden and immediate demands, which may be to the extent of a large proportion of his debts, while his profits are to be made in employing his own moneys and those entrusted to him in discounting bills, in loans, and other modes of investment. It is im-

possible that he should always have his assets in such a state as to be applicable immediately to the payment of all demands which may be made upon him; and if a partner has no power, under such circumstances, to borrow money for the partnership, either the assent of each individual member must be obtained, which may even be impracticable, or the concern must be ruined.

"We have no doubt at all, therefore, that, in ordinary banking partnerships, such power exists, and that the directors, by the terms of their appointment, had all the general powers, and among the rest, the power of borrowing, unless such power is excluded by other provisions of the deed."

The next case is that of *Curtis* v. *Leavitt*, 15 N. Y. 9, decided in 1857. The case grew out of the failure of the North American Trust and Banking Company, incorporated under the general banking law of New York, passed in April, 1838. This bank, having a paid-up capital of over $3,000,000, became embarrassed in 1840, and to provide means to meet its obligations issued its bonds in two series, one for one million dollars, and the other for half a million dollars; each series of bonds was secured by a separate deed of trust conveying specific assets of the company for that purpose. In 1841 the company went into the hands of a receiver, who instituted this suit to declare these bonds and the trust deeds securing them void as being beyond the corporate power of the company, and also as creating a fraudulent preference. The case was argued by some of the ablest counsel who ever practiced in New York, and from the opinions it is evident that it must have been most thoroughly argued and carefully considered. There were five of these opinions, delivered by Judges Comstock, Brown, Shankland, Paige, and Selden. Judges Johnson and Bowen concurred in the opinion of Judge Comstock. Chief Judge Denio did not sit in the case, having been of

counsel. Each of the opinions discusses the nature of the banking business and the powers given by the New York Banking Act of 1838. As those powers were given in language almost identical with that contained in the National Banking Act (the sections are quoted, p. *infra*), the decision is of peculiar importance, for it gave a judicial construction to the statute upon which the National Banking Act was modeled. We shall quote from the language of each of the opinions. (*Italics* ours unless noted otherwise.)

Comstock, J. (p. 51): "I come next to the objection that banking associations formed under the general law of 1838, have no power to borrow money, and hence that this corporation could not issue its bonds, create the trusts, or give any valid assurance for a loan. This is a very grave proposition, *opposed to the known practice of probably every banking institution in the state*. It should, therefore, be well considered before it is received as the law."

Page 52: "Banking is not in its nature a corporate franchise. In the absence of legislative restraints, it may be carried on by individuals and partnerships in all its departments of issuing, lending, receiving deposits, discounting, dealing in exchange, bullion, etc.; and in examining the powers of banking corporations, the nature and incidents of banking as a business, when not under special legal restraints, are in the highest degree important. It is true the question will always be one of corporate power rather than of the rules and principles of banking; but those rules and principles may have a decisive influence in the construction of charters which profess to confer powers of this description. And this leads me to observe that banking, regarded as a business and not as a franchise, *includes the borrowing of money as one of its features or incidents. As no one denies this proposition*, I will not dwell upon it further than to quote the remarks of an eminent English judge, Mr. Pemberton Leigh, Chancellor

of the Duchy of Cornwall, in a late case of the Privy Council (*The Bank of Australasia* v. *Breillat*, 6 Moore P. C. 152, 194)."

He then quotes part of the same passage which we have just quoted from that opinion, and continues (*italics* his):

"It may be quite material, when we come to examine the general banking act of 1838, to observe now, in passing, that in these observations, so just and forcible, the borrowing of money is spoken of, not as a *distinct department* or *branch* in the business of banking, but is asserted as the *incident and result* of two of its most important operations, *those of issuing and receiving deposits*."

He then proceeds to show that a banking partnership would undoubtedly have power to borrow money, and that a banking corporation must necessarily have the same power, unless expressly denied,—not as a grant of power, but as an incident to the other powers granted,—and shows that there are no restraints upon the power so long as it is exercised in the course of the banking business. His discussion of this branch of the subject runs from pages 51 to 66.

The parallelism between the language of the New York Act and that of the National Banking Act leads us to quote his remarks on the construction of that act from pages 56–58 (*italics* his):

"We come then to the question of construction, which to my own mind presents no difficulty. The argument on the other side urges that 'the business of banking' is authorized by the 18th section, only according to the specifications therein contained, among which the power to borrow is not found. To this the answer is, that these specifications, with the *issuing* power granted in the previous sections, cover the whole ground of banking. If the statute had omitted the general terms 'business of banking', and

had merely enumerated the power of issuing, and all the others named in the 18th section, that would have been a general grant of banking powers, including, as their incident, the right to borrow money when a necessity may arise in the exercise of those powers.

"To deny this conclusion is necessarily to assume (and it seems to be assumed, perhaps unconsciously) that borrowing is an independent operation in the business of banking; in other words, that it is banking in one of its branches, and hence that the power can not exist without a particular specification. This is, I think, plainly an error; and yet it appears to lie at the foundation of the opposing view of the present question. Now, in a very simple and elementary view of the subject, borrowing is not banking, nor is it in a just and proper sense any other kind of business. It is the incident and auxiliary of various kinds. Let us test this. If a person should open and keep an office for receiving deposits payable on demand, he would carry on a well known branch of banking business, although he might use the deposits in speculation or other modes totally unconnected with banking. He would be a banker. So if he were to keep an office for issuing his own circulating notes, or for dealing in exchange, or for discounting bills, and should actually carry on either of those operations without the others, he would exercise a banking power, although confined to a single one. But suppose he keeps an office and habitually borrows money on time, which he uses in manufacturing or some other branch of industry; was it ever supposed that such a practice made a man a banker? In truth he performs neither a banking nor a manufacturing operation, but one which is simply auxiliary to the business in which he is engaged. A banking corporation, therefore, when it borrows money, exercises an incidental and auxiliary power, not expressed, but implied from those which are expressed. On this ground the English Privy Council proceeded in the case of the *Bank of Australasia* v. *Breillat* (*supra*), as will be seen in the extract quoted above from the opinion in that case.

The right to borrow was not among the specifications in the deed, but was referred to the powers of issuing and of receiving deposits, which were specified. If these views are correct, they would seem to be decisive, for in the act of 1838 all known express banking powers are enumerated.

"The course of bank legislation in this state leads to the same conclusion. In the charters prior to 1825 there was no enumeration of the banking powers, but in that year the Commercial Bank of Albany was chartered, 'with all incidental and necessary powers to carry on the business of banking, by discounting bills, etc.,' proceeding with the same specifications as in the act of 1838, now under consideration. This was the model of a vast number of charters down to and including the year 1836, when special legislation of this kind ceased. Now, it is a fact not at all remarkable, but very pertinent to the present question, that in no special bank charter ever granted in this state was it thought of to specify the borrowing of money as one of the substantive and express banking powers. Yet I am not aware that it was ever before suggested that the right to borrow was excluded by the enumeration of those powers. Those specifications were evidently intended not to restrict the appropriate business of banking, but as a mere legislative definition of that business; a definition not indispensable, perhaps, but eminently useful, because it left nothing to construction or in doubt. Even the restraining laws may be referred to in corroboration of these views. Corporations, not expressly incorporated for banking purposes, were prohibited from exercising banking powers under a specification precisely like that found in all the special bank charters and in the general charter of 1838. (1 R. S. 712, secs. 3, 6.) Indeed, it would be difficult to conceive a greater absurdity than a prohibition against borrowing money in a statute intended merely to restrain unauthorized banking.

"Again, suppose a corporation were chartered under a special or general law for manufacturing purposes, with a particular authority to borrow money whenever deemed

necessary in the business: would that be considered a grant of one of the banking powers? Plainly not; and quite as plainly it would be, if the authority were to receive deposits or discount bills, or issue circulating notes."

The opinion of Brown, J., commences on page 133; that part of it which relates to the borrowing power begins on page 156. Having stated that the power, if given, is implied and not expressed, he says (p. 158):

"Whatever incidental power is a necessary and appropriate method to enable a banking institution to carry on the business of banking in the manner, to the extent, and with the means contemplated by the act of 1838, is as clearly within the terms of the grant as if it had been specifically mentioned. Before we can say, with any assurance, whether the power to borrow money is to be implied, we must look at the acts under which the associations are created, and see the nature of the business in which they are to embark, the usual and customary modes in which it is conducted, the instruments and resources with which they are to be furnished, and the emergencies and hazards to which the business is necessarily exposed. Banking is a system of credits. Its circulation is upon credit, it receives deposits upon credit, and if it deals in exchange, either domestic or foreign, that, too, is upon credit, more or less. It discounts bills and notes upon the faith and credit that its circulation will not be suddenly returned for redemption, or its deposits suddenly withdrawn. It is thus that it multiplies its capital and realizes its profits. Take away its power to use its credit, and confine it to the use of its capital alone, and its business would perish."

Page 160: "The right to raise money by loan for a legitimate end must exist as one of the incidental powers of the corporation, because its exercise may be indispensable to the preservation of its credit and the successful prosecution of its business. . . . So long as power is given to employ credit, as the basis of discount and circulation, the

power to borrow must be implied, or the business can not be usefully or successfully conducted. To refuse to recognize it as one of the powers conferred by the statute, is to withhold from the banking institutions a function necessary to their existence."

The opinion of Shankland, J., begins upon page 164, and that part of it relating to this question will be found on pages 164–171. Having shown that in the idea of a bank deposit there is nothing but a loan by the depositor to the bank, he continues (p. 166):

"In this last and widest acceptation of the term *deposit*, it was most probably used by the legislature of 1838; for it was well known in all commercial communities, at that period, and to all competent legislators, that *borrowing money to lend again is a part of the legitimate business of banking*. A banker is a dealer in capital, an intermediate party between the borrower and lender. He borrows of one party and lends to another, and the difference between the terms at which he borrows and lends is the source and measure of his profits. (Gilbert's Pr. Obs. on Banking, 25; 1 McCulloch's Com. Dic. 86–117.)

"I am unable to perceive any reasons of policy to deny to the banks the privilege of incurring obligation by way of loan while they can incur the like obligation by taking in deposits. In truth, the obligations we have seen are the same, except in name."

Page 169: "Although the power to borrow money may be justly predicated on the express power to receive deposits on the principles of construction above indicated, or may be found amongst the mass of unenumerated, incidental, and necessary ones, I prefer to put my opinion upon the broad ground that every corporation, unless prohibited by law, can incur obligations, as a borrower of money, to carry on the legitimate business for which it was incorporated, although not specially authorized to borrow by its charter. Such has been the uniform language of the courts in this country."

The opinion of Paige, J., begins upon page 182; that part of it relating to the borrowing power will be found on pages 209–222. On page 210, he says:

"The power of the North American Trust and Banking Company to borrow money may be maintained as an incidental power necessary to carry on the business of banking. This power has always been claimed and exercised by banks of discount in all commercial countries. In the original charter, granted in 1694 to the Bank of England (Act of 5 and 6 William and Mary, ch. 20) the power of that bank to borrow, as an incidental power, was conceded by imposing a restriction in respect to the amount to be borrowed. The same concession was made by the enactment of the several acts of the British Parliament, restraining in favor of the Bank of England, all corporations, etc., from borrowing money on their notes, payable at a less time than six months. The Scotch banks exercise this power. It is one of the principal sources of their profits, to borrow at a low rate of interest, and lend at a higher. (3 Edin. Enclyclo., tit. Bank, 220, 224; Cyclopædia of Arts, etc., tit. Bank; 1 Chitty on Bills, 15, 16.) . . . This power was always exercised by the old incorporated banks of this state, and it has also been exercised by the banking associations since the passage of the act authorizing their formation. It has been exercised by these banks as a legitimate power of banking, and as the necessary and usual means to enable the banks to carry on the business of banking."

Page 214: "The exercise of the power to borrow money is usual in the course of the ordinary business of a bank; and it is directly and immediately appropriate to the execution of the expressly granted powers."

While Judge Selden differed with his colleagues as to the authority of the North American Trust and Banking Company to issue the securities in question, he expressly concedes that borrowing is an ordinary incident of the

banking business, his language upon that subject being as follows (pp. 255, 256) :

"The receiver's counsel takes the broad ground, that banking corporations can not borrow money, or at least, that they can not borrow to supply the place of capital. They contend that it is the business of banks to lend money, not to borrow; that borrowing does not come within the scope of legitimate banking, and is in its nature a power which corporations created for banking purposes can not properly exercise. This position is not supported by any direct authority; and a careful consideration of the nature of banking, together with an examination of its history, has satisfied me that it can not be sustained. It is not in harmony with the present practice or the past history of banks."

Then, after referring to the practice of the English country banks and the Scotch banks which has been mentioned in the citations above made, he continues:

"It can scarcely be said, in view of these precedents and authorities, that borrowing money, even to be used as capital, is not within the range of the business of banking. The position, therefore, that the acts of the banking company in issuing the paper in question, were *ultra vires*, can not be sustained on the ground that borrowing is no part of legitimate banking, but must rest on that branch of the argument which is drawn from the terms of the general banking law itself."

The conclusions of the whole Court are set forth in fourteen propositions, stated on pages 294–297. Of these, the fifth, Judge Selden dissenting, declares that the North American Trust and Banking Company had power to borrow money and to issue time paper to secure a debt for moneys loaned. In *Barnes* v. *Ontario Bank*, 19 N. Y. 152, 156, this conclusion was re-affirmed as settled law without dissent from Judge Selden.

The last of the three cases mentioned above is *Ward* v. *Johnson*, 95 Ill. 215, decided in May, 1880. There a corporation called the Farmers', Merchants', and Mechanics' Savings Bank had all the powers ordinarily given to a commercial bank, and, in truth, was such, as stated by the Court on page 243, though styled a savings bank. This corporation established what it called an investment department, whereby certificates were issued for sums of one hundred dollars and upward, bearing interest at seven and three-tenths per cent per annum, secured by a deed of trust whereunder certain specific property of the corporation was put into the hands of trustees. The corporation also did a general banking business. The bank having failed and been put into the hands of a receiver, it was contended, as in the case of *Curtis* v. *Leavitt*, 15 N. Y. 9, that these certificates were invalid because given for borrowed money. On pages 237–239, the Court speaking through Mr. Justice Scholfield, after reciting the powers of the bank, say:

"In addition to these express powers, there can be no doubt that such corporations possess, also, the implied power to borrow money." . . .

"The corporation was authorized to contract and agree with persons desiring to make deposits or loan money, as to the terms. . . . The business is simply that of a bank obtaining money, and, so far as the public was concerned, presumably needed in its business, and securing it by a trust deed upon terms mutually satisfactory to the respective parties in interest. The name is not of the slightest consequence. The transaction itself, individually considered, is neither unusual nor extraordinary."

In *Planters' Bank* v. *Sharp*, 6 Howard, 301, this Court had occasion to consider a subject so nearly allied to the one under consideration as to be almost, if not quite, iden-

tical in its legal bearings; and although the matter did not then pass into judgment because the Court preferred to rest its decision upon another ground, yet the opinion of the Court was so expressed as to leave its conclusions not open to doubt. The exact question there involved was whether the Planters' Bank had power to rediscount its negotiable paper. The majority of the Court held this power was given to it by the 6th section of its charter empowering it "to grant, demise, alien, or dispose of for the good of said bank" its "goods, chattels and effects," the 22nd section further providing that the bank should not "discount any note or notes which shall not be made payable and negotiable t said bank." While resting the decision on the express power thus given the Court further considered the nature of the banking business, and in no uncertain terms made clear that in their opinion rediscounting was but an incident of the business of banking; that it was the duty of the bank "to pay in some way every debt;" and that rediscounting was but a means to that end. Further they say (p. 323):

"It is said, in opposition to this, Why should a bank be considered as able to incur debts? or, why to do any business on credit, requiring sales of its notes or other property to discharge its liabilities? Such inquiries overlook the fact, that the chief business and design of most banks, their very vitality, is to incur debts as well as have credits. All their deposit certificates, or bank-book credits to individuals, are debts of the bank, and which it is a legitimate and appropriate part of its business as a bank to incur and to pay. The same may be said, also, of all its bank-notes, or bills, they being merely promises or debts of the bank, payable to their holders, and imperative on them to discharge."

As we have stated, rediscounting is so closely analo-

gous to borrowing that it is difficult to conceive of a course of reasoning which should sustain the one and deny the other as an incident to the banking business. The same necessity which would call the one into action would equally demonstrate the necessity for the other. Which should be adopted is simply a matter of choice for the particular bank, having in view its condition at the time action becomes necessary.

As we have quoted statutes from Massachusetts and Ohio showing the power of banks organized under the general laws of those states to borrow money, it seems proper to insert here references to decisions from the Supreme Courts of those states upon the same subject.

It came before the Supreme Court of Massachusetts in *Commonwealth* v. *Bank of Mutual Redemption*, 4 Allen, 1. Besides the statutory provisions above mentioned, others were then in force by which banks were prohibited from making contracts in any form "for the payment of money at a future day certain, or with interest, except for money borrowed of the state," or of a state savings bank, or money deposited by an assignee for creditors, "and except also that all debts due to one bank from another, including bills of the bank indebted, may draw interest." There was also a penalty imposed upon a bank which issued notes with a stipulation that they should not be put into circulation or returned to the bank for a certain time. Under these statutory regulations the defendant borrowed $40,000 from another bank, payable four days after date, and gave to that other bank $40,000 of its bank notes, with the agreement that they should not be put into circulation or returned within the four days. The state bank commissioners filed their petition to enjoin such actions, and some others which it is not necessary to mention as they relate to another sub-

ject, alleging them to be violations of the statute; and the cause was heard upon a motion to dissolve an injunction granted upon that petition. With reference to the matter of borrowing money the Court said, p. 14:

"The right of a bank to borrow money from another bank is nowhere expressly prohibited. On the contrary, the right to do so would seem to be recognized in Gen. Sts. c. 57, sec. 26, by which it is expressly provided that debts due from one bank to another, including bills of the bank indebted, shall not be considered as within the prohibition of sec. 25, which limits the indebtedness of a bank to twice the amount of its capital stock, exclusive of sums due for deposits not bearing interest. The only restraint on the power to contract such a debt is contained in sec. 63 of the same chapter, which provides that no bank shall make any contract for the payment of money at a future day certain, or with interest. This language is certainly broad enough to cover a contract by one bank with another to pay money at a future day. That it was intended to include such contracts is strongly implied from the exception to the prohibition, by which it is provided that 'all debts due to one bank from another may draw interest.' The conclusion would seem to be inevitable that the legislature, in making this provision, had in view debts due from one bank to another, and intended to bring them within that part of the section which prohibits them from being made payable on time, but to exempt them from the prohibition of drawing interest. We can see no sufficient reason for limiting this exception to any particular class of debts existing between banks. It is applicable to every species of indebtment which may lawfully be due from one bank to another. . . . So far, therefore, as the defendants entered into contracts by which they borrowed money of another bank payable at a fixed time, they violated the law; but beyond this the allegation in the information setting forth that they borrowed money of other banks payable with interest, in violation of the statute, is not sustained."

In *Sturges & Co.* v. *The Bank of Circleville*, 11 Ohio St. 153, the question involved was not so much the power of a bank to borrow money as its power to guarantee payment of a bill of exchange sold by it, and of its cashier to act for it in giving such guaranty. But in deciding this, the power to borrow, and that through the cashier, was assumed as a premise undisputed, and upon which the conclusion of the existence of the power in the case under consideration could be built. The Court say, p. 167 (*italics* ours):

"But in this case, there being nothing to show any restriction or qualification of his powers in that regard, the duties of the cashier may reasonably be understood to extend to the buying and selling, and negotiating bills of exchange, checks and promissory notes, *as well as to that of borrowing money*, as the agent of the bank. In the discharge of his duty, he is supposed to be instructed and directed, either generally or specially, by the bank, either through its board of directors or president, as the case may be."

We also add the case of the *National Bank of Commerce* v. *National Bank of Missouri*, 30 Fed. Cas. 1121, Case No. 18,310, where the power of a national bank to borrow money was considered by Judge Dillon in October, 1878, in the Circuit Court of the United States for the District of Missouri. The action was at law, the plaintiff being a bank of New York and the defendant one of St. Louis, to recover $400,000 and accrued interest, being the balance due upon a loan of $1,000,000 made by the plaintiff to the defendant. The defendant bank had suspended in June, 1877, and a receiver had been appointed by the comptroller. The plaintiff's claim was presented to the receiver, and disallowed on the ground that the money was not borrowed by the bank, but by its directors for their own benefit. In

defense to the action it was also contended "that the defendant had no right to borrow money to loan again, and that a loan of this character was illegal and known to the plaintiff to be illegal when made." The defendant having admitted at the trial that the plaintiff was entitled to recover, unless one of the two defenses above mentioned was established, assumed the burden of proof. At the conclusion of its evidence the plaintiff moved for peremptory instructions in its favor. In granting this motion, Judge Dillon said with reference to the defense of lack of power:

"I am of opinion that a national banking association has, under the national banking act (13 Stat. 99), the power to borrow money, and that the defendant bank, in the absence of fraud brought to the knowledge of plaintiff bank, had the power to enter into the contract of December 26, 1866, which is the foundation of this action. The legal power of the bank to borrow money does not depend upon any exigency or upon the existence of a critical condition of its affairs, or upon an actual necessity for the immediate use of the sum borrowed. It may borrow money to conduct and carry on the business of banking, and it may borrow for the express purpose of lending the same, either by discounting the notes, bills, etc., of others or on personal security, with a view to profit by the transaction. The loan of money to a national bank is not invalid because the lender may know or have reason to believe that the borrowing bank intends to lend it, when received, to others. A national bank may lend its money to its directors as well as to other persons, provided it acts in good faith and does not exceed the limitation to any one person or director of 'one-tenth part of the amount of the capital stock of the association actually paid in.' There is no claim that the limitation was exceeded in this case, as the capital stock of the bank was $3,410,000 actually paid in. If the law were that a national bank could not borrow money for the purpose of lending the same again to its

directors, and that if the lender knew that such was the purpose of the borrowing bank, the transaction would necessarily be invalid, I admit that the evidence in the case is such as to justify the court to submit the question of the plaintiff's knowledge of such a purpose to the jury. But I am of the opinion that where no fraud is intended a national bank may lend its money to its directors, and the fact that the lender knows, or has reason to believe, that when the money he lends is received it will be lent to the directors, does not, unless he knows, or has good reason to believe, that a fraudulent use or disposition of it is contemplated by the directors when received, invalidate the transaction. The directors had no more power over the $1,000,000 obtained under the contract in suit than they had over the $1,000,000 which the defendant bank had on ordinary deposit with the plaintiff bank, or over the $3,000,000 of capital actually paid in. A lender can not knowingly aid an intended fraud, but he is not required not to lend because the borrowing bank may misuse their powers."

Upon the other defense he held that the evidence did not tend to show that the plaintiff was cognizant of any intended fraud.

The jury having returned a verdict in favor of the plaintiff for $445,582, under the instructions of the Court, and judgment having been entered thereon, a writ of error was afterwards sued out to this Court, as stated in the foot-note to the report. But as the files of this Court show this writ was subsequently dismissed under a stipulation of counsel, the judgment thus rendered was ultimately acquiesced in.

As stated above, other cases illustrating the judicial recognition which has been made of the power of banks to borrow money, will be mentioned later in discussing other propositions. To these we refer now, without stopping to quote from them. Indeed, after a thorough search, we

can say that we have found but one case or reference thereto, aside from the decision in the case of the *Western National Bank* v. *Armstrong*, wherein it was intimated that borrowing money was not an ordinary incident of the banking business. That single instance is the decision of Judge Blodgett, of the Northern District of Illinois, in the case of *Adams* v. *Cook County National Bank*. His opinion seems never to have been printed; at least, we have been unable to find it, and it has escaped the vigilance of the editor of the new series of federal reports, known as "Federal Cases." Wherever it is mentioned, reference is made to Ball on National Banks, page 54, a work published in 1881, as the primary publication. The opinion is there stated to be in manuscript, and nothing is given to show the nature of the case, what questions were before the Court, or whether the language upon this subject was decision or *obiter*. All that is said is the following:

"The power of a national bank to borrow money or to give notes is neither expressly nor impliedly given by the act. The business of the bank is to lend, not to borrow money; to discount other's notes, not to get its own notes discounted. A bank, under certain circumstances, might become a temporary borrower of money on time; yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the agent acting for the bank had special authority to borrow money. The burden of proof in such cases would be upon the lender."

EVIDENCE OF PRESENT USAGE.

It was shown by the testimony of seven experienced bankers of New York and six of Cincinnati that prior to the decision of this Court in the *Western National Bank case* it was an ordinary and usual incident in the banking busi-

ness for one bank to borrow from another; that by custom and usage it was within the scope of the authority of each of the executive officers of a bank—president, vice-president if actively engaged in the conduct of the bank, and cashier—to make application for such a loan; that they were never required to furnish any proof of their authority to make the application either in the form of a resolution of the board of directors of the borrowing bank or otherwise; and that the loan would be made either by rediscounting the negotiable securities offered by the borrowing bank (as was done in *Auten, Receiver*, v. *United States Nat. Bank*, No. 206 of this court's docket, October term, 1898), or by discounting the note of its officers (as was done in *Scott* v. *Armstrong, Receiver of Fidelity Nat. Bank*, 146 U. S. 499), or its own note, or by a mere credit (as in the case at bar), upon the faith of the correspondence, sometimes fortified by the note or certificate of deposit of the borrowing bank. When the transaction was not a rediscount, the borrowing bank usually gave collateral security,—which produced the same result; and the proceeds in either case were, as in the case at bar and others above mentioned, credited to the borrowing bank in its account with the lending bank upon the books of the latter, so that they could be drawn out only by checks of the officers of the borrowing bank in the regular course of business.

This testimony was summarized in the opinion of the Court below (Rec., pp. 334–337), and is absolutely uncontradicted. We shall not undertake, therefore, to quote it *verbatim*, but shall content ourselves with giving the names of the witnesses, with a statement as to their experience and a reference to the pages of the record where their evidence begins, and with quotations from two of the witnesses of each city as to the commonness of such transactions. The witnesses upon the subject were: M. M.

WHITE, an officer for the last twenty-one years of the Fourth National Bank of Cincinnati as cashier and president (Rec., p. 165); W. S. ROWE, engaged in banking business in Cincinnati for twenty-two years, and a cashier since 1881 (Rec., p. 186); H. C. YERGASON, who has been continuously for twenty-eight years cashier, vice-president, and president of the Merchants' National Bank of Cincinnati (Rec., p. 192); G. P. GRIFFITH, cashier and vice-president continuously since 1866, and for three years prior to that time assistant cashier (Rec. p. 195); J. D. HEARNE, president of the Third National Bank of Cincinnati since January 1882, and for eleven years prior to that president of banks in Covington, Kentucky (Rec., p. 200); WM. A. GOODMAN, a cashier, vice-president, or president ever since 1858 (Rec., p. 184)—all of the above being of Cincinnati; also the following of New York City: WM. J. QUINLAN, cashier since 1878 of the Chemical National Bank (Rec., p. 121); GEORGE G. WILLIAMS, cashier of that bank from 1855 to 1878, and since then its president (Rec., p. 129); DUMONT CLARK, with the American Exchange National Bank as assistant cashier, cashier, vice-president, and president, since 1868 (Rec., p. 134); A. P. HEPBURN, superintendent of the Bank Department of the State of New York from 1880 to 1884, then national bank examiner for over three years, comptroller of the currency from 1889 till 1893, and then president of the Third National Bank of New York City (Rec., p. 136); EDWARD TOWNSEND, cashier of the Importers' and Traders' National Bank for over fifteen years (Rec., p. 148); GEORGE F. BAKER, president of the First National Bank of that city, and connected with it for over thirty years as teller, cashier, and president (Rec., p. 150); and FREDERICK D. TAPPAN, cashier of the Gallatin National Bank for eleven years, and then its president for twenty-seven years (Rec., p. 151).

M. M. WHITE says (Rec., p. 165):

"Q. 6. Mr. White, can you tell us whether or not, prior to the decision of the Supreme Court of the United States, in the case of the *Western National Bank* v. *Armstrong, Receiver of the Fidelity National Bank*, in the spring of '94, it was considered an unusual or a usual thing for one bank to borrow money from another?

"A. It was a usual occurrence for them to do so; being regarded as legitimate in the line of banking business."

(Rec., p. 168.) "XQ. 3. What kind of loans do you refer to, Mr. White, as ordinary loans?

"A. Well, where a bank is short in money, and long in bills, as frequently occurs, it is legitimate and proper to discount those bills and build up the cash of the bank. It is not an unusual thing for a bank to discount freely in anticipating the withdrawal of deposits. You can't pay a check with notes; and the only thing to do, where you are long on bills and short on cash, is to discount these bills—lessening your bills receivable, and thereby increase your cash; which I refer to as legitimate banking."

W. S. ROWE says (p. 187):

"Q. 13. Mr. Rowe, was the borrowing of money by one bank from another an extraordinary thing in the banking business?

"A. No; the country banks often did it—borrowed from us.

"XQ. 1. Mr. Rowe, what proportion of these cases was the rediscount of paper loaned [owned?] by the bank?

"A. It was pretty hard to tell. Probably fifty to sixty per cent of it."

"XQ. 2. And then nearly half of it was actually loaned?

"A. Yes. Some of the country banks buy the securities of their own cities, or towns, or counties, and hold them to get money on, really, at certain seasons of the year when they need it, because those securities are better known. It is a class of securities that is better

known in the city than the paper they get, especially in the farming communities."

(Rec., p. 191.) "RDQ. 19. You spoke to Mr. Herron here about country banks borrowing money, Mr. Rowe. What class of banks do you designate as country banks?

"A. Banks in small places; the cities in the South, for instance; there are certain seasons of the year, during the moving of the crops—the cotton crops, for instance—when they need money to move the crop, and the banks borrow moneys to let their customers have, to move the crops. And the banks up in Ohio, in the agricultural districts, borrow money at certain seasons; up in the large wheat and corn countries; their customers will want money to buy cattle and stock with; and they frequently want more money than the country bank has, and we loan them the money on their municipal or other bonds, and carry the transaction until the crops or cattle are sold."

DUMONT CLARKE says (Rec., p. 134):

"Q. 8. Prior to the decision of the *Western National Bank* against *Armstrong*, by the Supreme Court of the United States in the spring of 1894—if I recollect right—was it, or was it not, a usual thing for a bank to borrow money?

"A. Yes, sir; very common occurrence.

"XQ. 1. In what shape was this borrowing made?

"A. Usually in the light of rediscounting the bills receivable; at times, however, collateral was furnished to us.

"XQ. 2. What evidence of such indebtedness was it usual to take?

"A. Simply the paper which they had discounted with the indorsement of the bank upon its back; at other times we would take a collateral note made by the bank; at other times a certificate of deposit made by the bank—in the last two cases collateral would be attached to such instruments."

A. B. HEPBURN says (Rec. p. 137):

"Q. 9. Do you know whether or not it was a usual thing for banks to borrow money from other banks prior to the decision by the Supreme Court of the United States in the spring of 1894, in the case of the *Western National Bank* against *Armstrong?*

"A. I do. It was usual."

This evidence is confirmed by information to be gathered from the reports of the Comptroller of the Currency to Congress, which, though they are not embodied in the record, will receive judicial notice because they are reports of a principal executive officer made to Congress pursuant to law. Rev. Stat. of U. S., sec. 333; *Heath* v. *Wallace*, 138 U. S. 573–584. On page 115 of vol. 1 of the Comptroller's report, made December 4, 1893, is given a consolidated statement of the conditions of national banks on October 3, 1893, from which it appears that the notes and bills rediscounted by banks in reserve cities other than New York, Chicago and St. Louis, as shown by the returns to the Comptroller, amounted on that day to $3,137,972, and their bills payable to $10,556,104; and that in the national banks not in reserve cities the notes and bills rediscounted then amounted to $17,928,765, and their bills payable to $16,628,834. On pages 254–275 of the same report will be found consolidated statements of the national bank returns to the Comptroller of the Currency for every year from 1863 to 1893, inclusive. Prior to 1869 notes and bills rediscounted, and bills payable, were not separately itemized, but in that year the separation began; and it will be seen that thereafter the amount of each item was never less than one million, and was generally several millions of dollars. During the years 1886 and 1887, which we choose because nearest to the transaction in question, the amount

of notes rediscounted ranged from $7,556,837.10 to $17,312,806.39; and the bills payable from $1,145,240.26 to $5,105,112.57. The amount of these loans afterwards greatly increased, with some fluctuations, until in July, 1893, it came to more than *sixty millions of dollars*, which was in round numbers ten per cent of the entire capital stock, forty per cent of the entire circulation, four per cent of the entire individual deposits, and three per cent of the entire loans and discounts, of all the national banks then reporting. This statement alone seems sufficient to show that borrowing money otherwise than by circulation or deposit is a normal and usual feature of the banking business. It is a standing resource of which banks avail themselves, as a matter of course, where profit offers, or occasion justifies their so doing.

To sum up the historical and oral evidence we have adduced, the very essence of the banking business, the corner-stone upon which it is built, is the power and ability to borrow money. As Professor Dunbar says (Chapters on Theory and History of Banking by Charles P. Dunbar, Professor of Political Economy in Harvard University, p. 24): "The bank being then obliged to extend its operations beyond the amount of its capital, is compelled for this purpose to make use of its credit. In fact, it is only by such a use of its credit that the establishment becomes in reality a bank." When it issues its circulating notes it borrows money. When it receives money on deposit upon a drawing account, again it borrows money. When instead of creating a drawing account it gives to the lender a certificate of deposit, again it borrows money. When it sells exchange, its own draft upon its correspondent in a different place, again it merely borrows money. Its sole aim and object is to borrow money that it may make a profit by lending it again.

From the beginning of the history of incorporated banks this feature of their business has been recognized. They have borrowed, and have been authorized to borrow, with interest as well as without; on time as well as on demand. Borrowing being the essential feature of a bank's existence is incidental to that business in all its branches. The terms on which the loan is made are matters of indifference in the absence of statutory prohibition; they become simply a matter of discretion as to the best method of conducting the business. And so, while some banks decline to pay interest upon deposits, others deem it to their advantage to swell their deposit accounts by allowing interest. In this lies the solution of the question we are concerned with. It is merely whether a bank in the ordinary conduct of its business may hire money, may pay to him who lends—for it always borrows—a consideration for the lending other than the mere promise to repay. We submit there can be but one answer to this question. The object of banking being to make profits by lending money, it is simply a question for the managers of the bank as to whether the greater profit will be reaped by hiring money than by confining itself to the use of that which demands no reward other than the promise of repayment.

At some times and in some places the money borrowed by the banks from their depositors without interest can all be lent again to their customers. But this is not always the case. At times more money is so deposited that the bank can lend again to those doing business with it; in such case the money borrowed by it must lie idle or seek some other than the usual channel of use. At other times, the money so deposited is not sufficient to meet the legitimate demand upon the bank for loans; in such case it must hire money elsewhere, or forego a legitimate profit within its reach. The situations just depicted are not ex-

traordinary, but normal, in certain places; that is to say, agricultural communities have ordinarily a glut of money deposited in the banks, while manufacturing communities have ordinarily an excessive demand for loans from the banks—excessive in the sense that the demand for loans in a community exceeds the money deposited by that community. Again, in agricultural communities in this country, as is well known, there is a certain season when the amount of money there circulating is insufficient to transact the business; at that season, known as the time for "moving the crops," the banks in agricultural communities must seek other funds than those lent to them by their own depositors. Hence it comes about that banks in the regular, ordinary, legitimate course of their business have occasion to borrow, and do borrow, money from other banks. At one point the demand for money is slight; at another it is great. The bank at the latter borrows from the bank at the former, and the equilibrium is restored. This borrowing may be by giving what is primarily the obligation of the borrowing bank, or by rediscounting notes it has already discounted. In either case the result is the same. Money is borrowed which the borrowing bank obligates itself to repay.

To say, therefore, that borrowing money is not a legitimate part of the banking business, is utterly to misconceive the nature of that business. The very breath of a bank's life depends upon its power to borrow money. That power failing, either from legal disability or from financial distrust, the bank is doomed. Able to borrow, it is able to lend again and to make money. If it pay interest to depositors, it may secure a larger volume of deposits, do a larger volume of business, and make larger profits. And if it may borrow at interest from one person or class to swell its deposit account, or the funds usable for its busi-

ness demands, it may from another. How it borrows and whence it borrows are not material; it matters not whether it borrow on deposit credited to the lender upon its books, or on its note or indorsement which the lender takes with him, or on its assurance, written or verbal, that the money will be repaid; all come to the some end. The essence is, the bank must borrow that it may lend again.

II. NATIONAL BANKS AUTHORIZED TO BORROW.

It remains to consider whether there is any thing in the National Banking Act which prohibits associations organized thereunder from exercising this power of borrowing, which we have seen to be incidental to the banking business, or limits it in such a way as to defeat the loan involved in the case at bar.

The national banking system was inaugurated by the act of February 25, 1863, 12 U. S. Stat. at Large, 665. The general powers granted to associations formed under that act are stated in sec. 11. We have said that this part of the present National Banking Act, of which that section was the prototype, was adapted from the New York General Banking Act, c. 260 of the laws of 1838; the analogue of sec. 11 of the act of 1863 is found in sec. 18 of the New York act. To show the closeness of the adaptation we shall make one quotation serve for both, words found in this portion of sec. 11 of the Federal act of 1863 and not in sec. 18 of the New York act being printed in *italics*, and words found in the New York act and not in the Federal act of 1863 being enclosed in brackets.

Each provides that associations organized thereunder "shall have power to carry on the business of banking, *by obtaining and issuing circulating notes in accordance with the provisions of this act*; by discounting bills, notes, and other

evidences of debt; by receiving deposits; by buying and selling gold and silver [,] bullion, foreign coins, and bills of exchange, *by loaning money on real and personal security*, in the manner specified in their articles of the association, for the purposes authorized by this act; [by loaning money on real and personal security;] and by exercising such incidental powers as shall be necessary to carry on such business."

The act of 1863, not proving sufficiently attractive to banking capital, was remodeled by the act of June 3, 1864, 13 U. S. Stat. at Large, 99. Sec. 8 of that act was the equivalent of sec. 11 of the preceding act. The subject embraced within the provision above quoted was embodied in the subsequent revision of the United States Statutes as the seventh clause of sec. 5136. Some slight changes were made in that revision, and to show these, as well as to make the history complete, we again make one quotation serve for both, printing within brackets such words as are found in the Revised Statutes which were not in the act of 1864, and in *italics* those which were in the act of 1864, and not in the Revised Statutes.

Such association "*may* [shall have power] . . . [Seventh—To] exercise *under this act* [by its board of directors, or duly authorized officers or agents, subject to law,] all such incidental powers as shall be necessary to carry on the business of banking [;] by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by lending money on personal security; [and] by obtaining, issuing, and circulating notes, according to the provisions of this *act* [Title]."

As the act of 1863 follows almost *verbatim* the New York act of 1838, it must be presumed that Congress in adopting the latter act adopted also the well known and

settled construction which, in *Curtis* v. *Leavitt*, 15 N. Y. 9, and *Barnes* v. *Ontario Bank*, 19 N. Y. 152, 156, had previously been given to it by the Court of Appeals of New York; *McDonald* v. *Hovey*, 110 U. S. 619, 628; *Willis* v. *Eastern Trust & Banking Co.*, 169 U. S. 295. The act of 1864 and the Revised Statutes have inverted the order of the phrases, and have placed the grant of incidental powers at the beginning instead of at the end of the clause; and in the revision a confusing semi-colon was inserted after the word "banking". It needs but little reflection to satisfy the mind that these changes do not signify a change of meaning.

In the first place, as to the change in punctuation, it is a well-known rule that punctuation neither makes nor mars a statute; *Hammock* v. *Loan and Trust Co.*, 105 U. S. 77, 84. Particularly is this true when the statute is but a revision of previous enactments; *United States* v. *Le Bris*, 121 U. S. 278; *United States* v. *Lacher*, 134 U. S. 624.

In the second place, the act of 1864 was, so far as this branch of it was concerned, manifestly but a revision of that of 1863; and the rule just referred to as to the construction of revising statutes applies as well to a mere change of order as to change in punctuation.

Again, to suppose that the change of order signified a change of construction would be to affirm that the specific powers mentioned were themselves incidental to the business of banking, and, in grammatical phrase, were used in the act of 1864 as in apposition to the words *incidental powers*. But these powers specifically named are not incidental to the business of banking; they are themselves different branches of that very business. An institution may be a bank by having one or more of these powers and without having all of them; but if it have none of them, it can not be a bank. A bank may be a bank of discount, or

of deposit, or of exchange, or of circulation; or it may have all of these powers or only some or one of them. In each case, with the specific grant of power denoting the kind or species of banking business it is to do, would follow the power to do all things incidental to that kind of banking business. The act of 1864 therefore does not differ in legal effect from that of 1863. In each case associations were authorized to do the various kinds of banking specifically named, and all other things that would be incidental thereto. By the change of order it was not intended to signify that the principal was considered as merely an incident, and to limit the powers given by the act of 1863 to the measures specifically named in that act and in the act of 1864.

This conclusion, reached from consideration of the subject-matter and the words used, is confirmed by the proceedings in Congress during the passage of the act of 1864. As already stated, the act of 1863 had not accomplished all that had been desired. The reports of the Comptroller of the Currency show that by April 4, 1864, only 307 national banks had been organized, with an aggregate capital stock of a little over $42,000,000. Banking capital had not been tempted to this new form of investment. It was necessary to revise the scheme and to enlarge rather than to limit the powers given to the banking associations. For this purpose the act of 1864 was originally introduced in the House of Representatives on March 14, 1864, as House Bill No. 333; meeting with much opposition in that form, and having been tabled on April 6, it was reintroduced in a form modified to meet the objections made (none of which touched the subject under discussion) on April 11 as House Bill No. 395. This bill was speedily passed in the House, but received more deliberate consideration in the Senate. The bill having been reported

from the Senate finance committee by Senator Sherman, was explained by him on April 26, 1864, with an indication of the changes made from the act of 1863 and the reasons for them. We quote from his remarks as reported in the Congressional Globe, 38th Congress, First Session, p. 1865:

"Nearly all the provisions contained in this bill are contained in the act of last year. There are many changes, however, but they are changes of detail, transposition, verbal modifications which are found to be necessary in order to make the law of last year effective and easy of execution. There are, I believe, but six or seven important propositions contained in the new bill that will be likely to excite the attention of the Senate, and I will name them in order to call the attention of Senators to them, so that they may see the difference between this measure and the measure that was passed a year ago."

He then specifies the following subjects:

1. Under the old law banks redeem their bills at their own counter only; under this bill at one of some other places named by the Comptroller of the Currency.

2. The authority of the states to tax property of national banks, before obscure, is by this bill clearly limited and defined.

3. The bill provides for converting state banks into national banks.

4. A change had been made in the rate of interest which such banks might charge; but this change had not met the approval of the Senate finance committee, and they had recommended a restoration of the former provisions on that subject.

5. New provisions as to bonds as a basis for circulation.

6. New provisions as to the denomination of circulating notes.

He then says: "These, I believe, are all the important modifications of the system." Neither in the House nor in the Senate was there any debate at all upon the change in form in this section, and the conclusion is, we submit, irresistible that it was looked upon as a mere matter of detail and revision without purposed change of meaning.

Under each act it was intended to grant the power to do certain specific branches of the banking business, and such other things as were incidental thereto; in the earlier act the incidental clause was written at the end, and in the latter in the beginning. Where it should go is a matter merely of taste in composition. For ourselves, we submit that Judge Sage was correct when he said, in deciding this case in the Circuit Court, that the present form, "though clear, is not put in a strictly logical order. Without changing its meaning it might be paraphrased so as to read," as expressed in the act of 1863 (Rec. p. 314). To the same effect is the opinion of the Supreme Court of Ohio in *Shinkle* v. *First National Bank*, 22 Ohio St. 516, 524, where they said, referring to this provision as it is found in the act of 1864 (*italics* theirs):

"The words, 'by discounting promissory notes, drafts, bills of exchange,' etc., contained in that section, are not to be read as limiting the modes of exercising the *incidental powers* granted, but as limiting and defining the *kind of banking* which is authorized by the act. In other words, the association is authorized by section 8 to carry on '*banking* by discounting and negotiating promissory notes, drafts, bills of exchange,' etc., and to exercise '*all* such incidental powers as shall be necessary' for that purpose."

So if this were all that were to be found in the National Banking Act upon this subject, we should claim with confidence that the right to borrow existed as inci-

dental to the powers expressly given, and should need only to refer to the prior history of the act and of the banking business as to how and by what officers or agencies those express powers had usually been exercised, to maintain our proposition.

But this is not all. The third clause of Rev. Stat., section 5136, gives national banks power "to make contracts"; and Rev. Stat., section 5202, recognizes the borrowing of money as among the contracts which can thus be made, for that section says:

"No association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

First. Notes of circulation.

Second. Moneys deposited with or collected by the association.

Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

Fourth. Liabilities to the stockholders of the association for dividends and reserve profits."

It will be observed that this clause is modeled upon and copied almost *verbatim* from those found in the Ohio acts referred to on page 37, *supra*; also that the excepted liabilities which may be without limit include all those which could be made by a direct exercise of the powers specifically granted by clause 7 of sec. 5136. Hence it follows necessarily that this section, as did sec. 26 of the act creating the Bank of England, *supra*, p. 29, and par. 9 of sec. 7 of the act creating the first Bank of the United States, *supra*, p. 31, and other statutory provisions already mentioned, recognizes the existence of the power to borrow,

and that by means other than those specifically defined in sec. 5136, by putting a limit upon it. And as the limitation is that "no association shall at any time be *indebted*, or in any way liable," it covers not merely indirect liabilities by contracts of indorsement or guaranty, such as were sustained in *People's Bank* v. *National Bank*, 101 U. S. 181, but the direct creation of an indebtedness—in short, borrowing money.

And so these provisions have heretofore been construed. In *Eastern Townships Bank* v. *Vermont National Bank*, 22 Fed. 186, where a national bank had agreed to pay interest at six per cent as a consideration for a deposit of $50,000, and this indebtedness had been disallowed by its receiver as being without the scope of its corporate powers, Wheeler, J., said, p. 188:

"It bore interest like a loan. If it was a loan, then the question is as to the power to borrow money. Among the powers of such banks specially named is that to make contracts. Section 5136, subd. 3. There is no apparent limit to this power, except that contained in section 5202. That section provides that no association shall at any time be indebted or in any way liable to an amount exceeding the amount of its capital stock actually paid in and undiminished, except for circulation, deposits, and drafts drawn against existing funds, and to its stockholders. This implies that it may become indebted within the limit, even if the power to make contracts generally should be held to apply to something else. Powers impliedly given are as well conferred as those expressly given. *National Bank* v. *Graham*, 100 U. S. 699."

This construction was approved by the Circuit Court of Appeals for the Ninth Circuit, McKenna and Gilbert, Circuit Judges, and Hawley, District Judge, in *Weber* v. *Spokane National Bank*, 29 U. S. App. 97; 64 Fed. 208,

where it was also held,—following the analogy of *National Bank* v. *Matthews*, 98 U. S. 621, upon sec. 5136, of *Gold Mining Co.* v. *National Bank*, 96 U. S. 640, upon sec. 5200, and of *National Bank of Xenia* v. *Stewart*, 107 U. S. 676, upon sec. 5201,—that breach of the limitation did not affect the validity of the loan, but merely furnished cause for forfeiture of the charter, thus inserting by intendment the express provisions found in the acts relating to the Bank of England, the Banks of the United States, and in the Massachusetts Statutes above referred to.

In *First National Bank* v. *Exchange National Bank*, 92 U. S. 122–127, this Court, after quoting Rev. Stat., sec. 5136, par. 7, said:

"Authority is thus given to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted. These are such as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others. Its own obligations must be met, and debts due to it collected or secured. The power to adopt reasonable and appropriate measures for these purposes is an incident to the power to incur the liability or become the creditor. . . . Banks may do, in this behalf, whatever natural persons could do under like circumstances."

This we submit, fully sustains our contention, and concedes that national banks may borrow money as fully and as freely as other banks of issue, deposit, discount and exchange.

In *Western National Bank* v. *Armstrong*, 152 U. S. 346, the Court referred to and quoted part of this passage, and expressed no intent to limit its doctrine. Indeed the power

of a national bank to borrow money under certain circumstances was expressly conceded. But the Court assumed that the exercise of this power was an extraordinary and not an ordinary incident in the banking business. No examination of the subject is made in the opinion, and the language used seems to have been taken almost *verbatim* from the opinion of Judge Blodgett in *Adams* v. *Cook County National Bank*, as quoted in Ball on National Banks, 54 (*supra* p. 69). Our effort has been to bring to the attention of the Court other sources of information, and to show that the assumption of Judge Blodgett, followed without discussion in the *Western National Bank* case, is contradicted by the whole history of banking, in conflict with the actual practice of banks at the present day, opposed to the weight, and otherwise uniform tenor, of judicial opinion, and overlooks the implied grant of power necessarily following from Rev. Stat., sec. 5202. If we have not succeeded in this effort, then our labors on this branch of the case, though not light, have been in vain. But if we are right, then the statement we so earnestly but respectfully controvert is based upon an error of fact and is not conclusive upon this Court in any other cause, and should not be allowed to prejudice the rights of other persons. We submit that banks having the powers given expressly by Rev. Stat., sec. 5136, and inferentially by sec. 5202, are authorized to borrow money, in large sums or in small, with interest or without, on time or on demand, by deposit, by note, by bill, by bond, or by any other form of contract; and that such transactions are not presumptively out of the course of ordinary and legitimate banking. Whether any particular transaction is without that course is to be determined by the circumstances attending it. No inflexible rule can be laid down which will be applicable to all circumstances and all conditions. But the power

being general, and its use regular, it is to be presumed, *prima facie*, in any particular case that it was properly used, and the burden is on him denying to show the contrary.

III. HOW BORROWING POWER EXERCISED.

As a national bank is an ideal being only, it can act only through others. If it borrows, it must borrow through agents; agents must effect the loan, though in the name of the bank. What agents? The statute says that the bank shall exercise all its powers, principal and incidental, "by its board of directors, or duly authorized officers or agents;" (Rev. Stat., sec. 5136, par. 7). Waiving the question, because not necessary for our case, whether this is a direct grant of power to the officers,—as to which see *Briggs* v. *Spaulding*, 141 U. S. 132, 144–146,—we shall assume that the board of directors is the sole source of authority.

But as that board is a collective body, manifestly it also can not act directly in effecting a loan. It may resolve; but what it resolves must be communicated by others. It also must act through authority delegated to others. And it may delegate not merely ministerial authority but discretionary power as well. Instances are furnished by the cases of *Fleckner* v. *Bank of the United States*, 8 Wheaton, 338; *Merchants' Bank* v. *State Bank*, 10 Wall. 604; *Ridgway* v. *Farmers' Bank of Bucks Co.*, 12 S. & R. 256; and *Burrill* v. *Nahant Bank*, 2 Met. (Mass.) 162. Others have been given in the cases already referred to in discussing the nature of the borrowing power; and still others will be found in the cases yet to be mentioned.

How should this delegation be shown? We believe the following analysis shows all the ways in which a board of directors can delegate its powers; and that by these

methods or one of them it can delegate any or all of its powers in the transaction of business.

(1.) By special warrant or resolution for the particular occasion.

(2.) By general warrant expressly given by by-law or resolution.

(3.) By general warrant impliedly given as shown by

(*a.*) Custom judicially known.

(*b.*) Custom proved as a fact.

(*c.*) Abdication by the directors.

We do not pretend that in the case at bar there was any warrant by express resolution either special or general authorizing this loan.

But we do contend that there was an implied warrant shown by each of the methods above mentioned; and that for transactions like that here in question an implied warrant is just as effectual as an express one. For, as this court unanimously said in *Mining Co.* v. *Anglo Californian Bank*, 104 U. S. 192, 194, speaking of the delegation by a board of directors of authority to negotiate loans (*italics* ours):

"*It is settled law* that the existence of such authority in subordinate officers may be shown otherwise than by the official record of the proceedings of the board."

Custom.—Custom is the root and source of all unwritten law. In its early stages it must be proved like any other fact. But if general in its nature, after being several times proved it becomes so well known that courts take judicial notice of it. An interesting illustration of this process is furnished by the oleomargarine cases recently decided by this court; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1.

Custom has clothed certain agents with certain powers.

And whoever employs such an agent is presumed to give him all the powers usually attached to his agency; if he would not do so, he must bring home to him who deals with the agent, notice of the restriction he would impose; otherwise the presumption becomes conclusive. Story on Agency, secs. 57–60, 73.

All business contracts are presumed to be made, all agencies are presumed to be granted, with reference to the usages of trade affecting that business or agency. And those usages are determined and found to exist not merely from what the Court may know judicially, but from evidence adduced to prove them.

So in *Ekins* v. *Macklish*, Ambler, 184, Lord Hardwicke received evidence to show a usage of trade whereby a factor to collect rent under a charter party for a ship had authority also to sell bills of exchange received in payment of such rent.

In *Noble* v. *Kennoway*, 1 Douglas, 510, Lord Mansfield and his associates upon the King's Bench in an action upon a marine policy insuring ships until they had arrived at their port of discharge and been moored there twenty-four hours, and their cargo until discharged and safely landed, received evidence to show a usage of trade to delay discharging cargo for the purpose of fishing.

In *Adams* v. *Pittsburg Insurance Co.*, 95 Pa. St. 348, the Court held evidence should be received to show a usage authorizing the captain of a vessel to give notes at its home port for insurance premiums.

And in *Crain* v. *National Bank*, 114 Ill. 516, where a private bank was sued upon a note given by its cashier in its name for money which he embezzled, the Court held evidence should be received to show it was customary for banks in that place to borrow money on time, as tending to

show such borrowing was within the scope of the duties of the cashier.

The directors of a commercial corporation are presumed to know the acts usually performed by each of the officers of such a corporation. And if by the custom of the trade an incumbent of an office is commonly considered as authorized to buy or sell goods, to give or discount notes, to borrow money, or to do any other act upon behalf of his corporation, then by appointing a person to that office they clothe him with apparent authority to do each of those acts which holders of like offices are accustomed to do.

The directors of a bank are conclusively presumed to know not merely the rules affecting the banking business which have been crystallized into law, but the usages of that business in the places where the bank transacts it, not only in the home city, but in those of its ordinary correspondents. And whatever powers the board may expressly by resolution confer upon the officers of the bank, it is presumed to confer as well not only the powers which the law has declared to be inherent in those offices, but those which the usages of banking in those places have affixed to them. And these presumptions are conclusive in favor of any one dealing with the bank to whom notice of a limitation placed by the directors upon the powers of officers is not brought home.

Therefore, in *Minor* v. *Mechanics' Bank*, 1 Peters, 46, 70, this Court, speaking through Mr. Justice Story, held that it would be error to refuse an instruction that the assent of the directors might be assumed to actions of the cashier according to the usage of banking, and which the directors could have authorized, though there was no proof that the specific actions were actually known to them, saying:

"The point of the instruction is, that the established usage and practice of the bank for a long period, known to the president and directors, does afford a presumption of the approbation, assent, and acquiescence of the president and directors, as to such usage and practice; though the balances resulting therefrom, were not formally communicated to the directors. From the shape of the prayer, it is undoubtedly meant that such usage and practice was known to the president and directors, as a board, and in their official character, and received their approbation as such. In a general view, with reference to the principles of the law of evidence, we are not prepared to admit, that such a presumption could not ordinarily arise. The ordinary usage and practice of a bank, in the absence of counter proof, must be supposed to result from the regulations prescribed by the board of directors; to whom, the charter and by-laws, submit the general management of the bank, and the control and direction of its officers. It would be not only inconvenient, but perilous, for the customers, or any other persons dealing with the bank, to transact their business with the officers upon any other presumption. The officers of the bank are held out to the public as having authority to act, according to the general usage, practice, and course of their business; and their acts within the scope of such usage, practice, and course of business, would, in general, bind the bank in favour of third persons possessing no other knowledge. In the case of the *Bank of the United States* v. *Dandridge*, 12 Wheat. 64, the subject was under the consideration of this Court; and circumstances far less cogent than the present to found a presumption of the official acts of the board, were yet deemed sufficient to justify their being laid before the jury, to raise such a presumption. If, therefore, the usage and practice alluded to, in the instruction, were within the legitimate authority of the board, and such as its written vote might justify, there would be no question, in this Court, that it ought to have been given."

And in *Insurance Co.* v. *McCain*, 96 U. S. 84, 86, this Court, speaking through Mr. Justice Field, said:

"The law is . . . plain, that special instructions limiting the authority of a general agent, whose powers would otherwise be co-extensive with the business entrusted to him, must be communicated to the party with whom he deals, or the principal will be bound to the same extent as though such special instructions were not given."

And in *Case* v. *Bank*, 100 U. S. 446, 454, this Court, speaking through Mr. Justice Clifford, said:

"Cashiers of a bank are held out to the public as having authority to act according to the general usage, practice, and course of business conducted by such institutions; and their acts, within the scope of such usage, practice, and course of business, will, in general, bind the bank in favor of third persons 'possessing no other knowledge.' *Miner* v. *Mechanics' Bank of Alexandria*, 1 Pet. 46.

"Neither the public at large nor third persons usually have any other knowledge of the powers of a cashier than what is derived from such usage, practice, and course of business; and it would be the height of injustice to hold that the bank, as the principal to the cashier, may set up their secret and private instructions to the officer, limiting his authority in respect to a particular case, and thus to defeat his acts and transactions as such agent, when the party dealing with him had not and could not have any notice of the secret instructions. Story, Agency (6th ed.), sec. 127.

"Such an officer is *virtute officii* intrusted with the notes, securities, and other funds of the bank, and is held out to the world by the bank as its general agent for the transaction of its affairs, within the scope of authority, evidenced by such usage, practice, and course of business."

These principles are so familiar it surely is not necessary for us to add further citations to those made by the Court below (Rec., pp. 345, 346).

In the case at bar the negotiation for the loan was by correspondence conducted on the part of the borrowing bank by its vice-president. The evidence shows that the vice-president was the active controlling officer of the bank; in fact, though not in name, its president. With the original application for the loan was transmitted a certificate of deposit, signed by the cashier. Either this certificate was regularly issued for a deposit actually made, or it was not, but simply for the purpose of evidencing this loan. If it was regularly issued for an actual deposit, the Chemical Bank is entitled to recover upon that certificate, and the discussion must stop there. If it was not so issued, then the cashier as well as the vice-president, was acting for the borrowing bank in requesting the loan. Therefore, we have, at worst, the case of the acting president and the cashier of a bank requesting that bank's correspondent and reserve agent to make it a loan. And the question is whether authority to present such a request and to affect such a loan falls within the scope of the duties of those officers, or either of them, as established by the usage of banking, either as judicially known or as proved to exist in the cities where the two banks did business.

The cashier is the ostensible executive officer of the bank. Through him the bank confers with the outside world. Through him the board of directiors make known to its customers its demands and requirements, its special usages and practices. They are its brain; he its mouth as well as its hand.

The president, or officer acting as president, is superior in dignity to the cashier, and may well do those things which the cashier commonly does, and further give the countenance of his responsibility to acts within the scope of the apparent authority of the cashier.

Any act which has the approval of these two officers

has the approval of each; and if it be something which is incidental to banking as a business, and not an extraordinary act necessarily outside of the conduct of a bank, when approved by either of these officers, is to be taken as approved and authorized likewise by the board of directors.

We have already stated, possibly at too great length, the evidence of which the Court will take judicial notice, that banking is necessarily borrowing; that every form of borrowing is incidental to the business; that this has been recognized by legislatures ever since banks were incorporated; and that works on banking recognize the ability to make use of the various forms of borrowing as one of the ordinary resources of a bank.

It follows from this that requesting or negotiating a loan comes as much within the scope of the duties of the cashier of a bank or his superior officer as requesting a deposit. Ordinarily it is no more than agreeing to pay interest upon a deposit. And this was true in the case at bar; for under Rev. Stats., secs. 5191, 5195, a general credit to a Cincinnati bank by its reserve agent in New York is as much a part of the deposits of the Cincinnati bank as moneys actually paid over its own counter.

The size of the loan can not of itself determine the power of the officer to effect it. Magnitude, in its relations to business, is always a question of proportion; and the mere statement of figures can not of itself characterize a transaction as extraordinary and beyond the power of an officer ordinarily authorized to effect such transactions, unless the sum runs to an amount which no human experience can conceive as permissible. Within that limit evidence is required to show that the transaction is extraordinary. If this be shown, then, by that fact, notice is charged upon the lender to inquire as to what authority has been

given the cashier to do an extraordinary thing. But in the absence of evidence of that character the cashier is as much authorized to borrow a sum that seems large as one that seems small.

Magnitude being a question of proportion, the scale varies according to the circumstances. What would be a perfectly legitimate request for accommodation from a partner in a firm having a capital of $100,000 would be extraordinary coming from one in a firm having a capital of $10,000, and in the latter case might well put the lender to inquire as to authority. And so what would be a startling proposition coming from a small country bank would excite no comment when made by a bank of a large city. New York and London measure transactions by one scale; Cincinnati and St. Louis by another; Paducah and Kalamazoo by still another. So the number of digits necessary to express the sum loaned do not of themselves show whether that loan is large or small; that can be determined only by the apparent business demands of the person asking the loan.

Therefore the fact that the loan here was for $300,000 does not of itself show that the loan was large. The borrowing bank was not a small rural concern, but one in a city important enough to furnish reserve banks for other cities under Rev. Stat., section 5191, and advertising its capital as $1,000,000, and its loans and discounts at over $4,000,000 (Rec., p. 286). The request was made of its reserve agent; and the reason stated for the request was the desire to keep a large reserve (Rec., pp. 21–22). There is absolutely no evidence even tending to show that any person accustomed to the banking business would at that time have regarded this request as one for an extraordinary amount and suspicious in itself. And in the absence of

such evidence we submit that this Court has no power to draw any such inference.

The custom of banking, whereby cashiers have implied authority to borrow money for their banks, has been judicially recognized without proof in the courts of last resort in New York, Ohio, Pennsylvania, Missouri and Wisconsin:

Barnes v. *Ontario Bank*, 19 N. Y. 152.

Sturges v. *The Bank of Circleville*, 11 Ohio St. 153, 167.

First Nat. Bank of Allentown v. *Sullivan*, 11 W. N. C. 362.

Donald v. *The Lewis County Savings Bank*, 80 Mo. 165.

Rockwell v. *Elkhorn Bank*, 13 Wis. 653.

Ballston Spa Bank v. *The Marine Bank*, 16 Wis. 120, 134.

We do not stop now to quote from these cases, although we shall quote from some of them hereafter. They show conclusively how wide spread and of what long standing has been this custom, and that in 1887, when the transaction took place in the case at bar, no one conversant with the banking business would have dreamed of requiring a known bank officer to produce credentials to show his authority to borrow money upon behalf of his bank.

Not only is the existence of the power to borrow, as inherent in the office of the cashier and his superior officers, established by the course of reasoning just urged, and by the decisions just cited in which it has been directly recognized; it is affirmed also by decisions as to cognate acts. For where the authority of an agent is to be inferred from the powers usually exercised by such an agent, it is enough if the transaction in question involves precisely the same general powers, though applied to a new subject-matter. *Merchants' Bank* v. *State Bank*, 10 Wall. 604.

It will be remembered that the borrowing is not always done, as in this case, by a simple request and credit, or the

actual transfer of funds. The loan may be evidenced by a promissory note originally discounted by the lending bank, or by the latter bank rediscounting paper which has already been discounted by the borrowing bank. This appears in the testimony of the witnesses referred to *supra*, p. 71. As stated earlier in this argument, rediscounting is simply a form of borrowing; the bank obtaining the rediscount necessarily indorses the paper rediscounted, and thus pledges its own credit therefor. It stands with reference to the lending bank just in the same position that the original discounter stood with reference to it; and as the original discount was a loan by it, so the rediscount is a loan to it. So, all the authorities which sustain the power of executive officers of a bank *virtute officii* to rediscount paper, sustain also the power of those officers to borrow in any other manner that is usual in the banking business.

That it falls within the apparent scope of the duties of the cashier or other executive officers of a bank to raise money for its use by rediscounting, by selling paper with guaranty of payment, and in other ways, has often been judicially declared.

The germ of the idea lies in what was said by Mr. Justice Story, in 1825, in *Wild* v. *Bank of Passamaquoddy*, 3 Mason, 505, 506, viz.:

"The cashier of a bank is, *virtute officii*, generally intrusted with the notes, securities, and other funds of the bank, and is held out to the world by the bank as its general agent in the negotiation, management, and disposal of them. *Prima facie*, therefore, he must be deemed to have authority to transfer and indorse negotiable securities, held by the bank, for its use and in its behalf. No special authority for this purpose is necessary to be proved. If any bank chooses to depart from this general course of business, it is certainly at liberty so to do; but in such case, it is in-

cumbent on the bank to show that it has imposed such restriction, and that such restriction is known to those with whom it is in the habit of doing business. In the present case, the cashier has, as cashier, indorsed the bill in behalf of the bank, and this is *prima facie* evidence of authority, it being within the ordinary duties performed by such an officer. If he was restricted in his authority, it is for the defendants to show it. The proof is in their possession, and the plaintiff, who is a stranger to their regulations, can not be presumed to be conusant of it."

See also the cases cited under proposition IV, *infra*, and *West St. Louis Savings Bank* v. *Shawnee Bank*, 95 U. S. 555.

People's Bank v. *National Bank*, 101 U. S. 181.

Sturges & Co. v. *Bank of Circleville*, 11 Ohio St. 153.

Bank of the State v. *Wheeler*, 21 Ind. 90.

Houghton v. *First National Bank of Elkhorn*, 26 Wis. 663.

Bissel v. *First National Bank of Franklin*, 69 Pa. St. 415.

First Nat. Bank v. *Sullivan* (Sup. Ct. Pa.), 11 W. N. C. 362.

Crain v. *National Bank*, 114 Ill. 516.

City Bank of New Haven v. *Perkins*, 29 N. Y. 554, 569.

Merrill v. *Hurley*, 6 So. Dak. 592.

City National Bank v. *Hastings*, 46 Neb. 86.

In the case of *West St Louis Savings Bank* v. *Shawnee Bank*, 95 U. S. 557, this Court, in speaking of the powers of the cashier, say, through Mr. Chief-Justice Waite, on page 559:

"Ordinarily, the cashier, being the ostensible executive officer of a bank, is presumed to have, in the absence of positive restrictions, all the power necessary for such an officer in the transaction of the legitimate business of bank-

ing. Thus, he is generally understood to have authority to indorse the commercial paper of his bank and bind the bank by the indorsement. So, too, in the absence of restrictions, if he has secured a *bona fide* rediscount of the paper of the bank, his acts will be binding because he has implied power to transact such business."

In *People's Bank* v. *National Bank*, 101 U. S. 181, where the vice-president of the defendant bank had by guaranty of payment, without authority from its board of directors, induced the plaintiff bank to purchase certain negotiable notes made by a debtor of the defendant bank to his own order and indorsed in blank, the proceeds being turned over to the defendant bank, this Court, speaking by Mr. Justice Swayne, after quoting from Revised Statutes, section 5136, as to the powers of a national bank to discount and negotiate negotiable paper, say (p. 183):

"To hand over with an indorsement and guaranty is one of the commonest modes of transferring the securities named. Undoubtedly a bank might indorse, 'waiving demand and notice,' and would be bound accordingly. A guaranty is a less onerous and stringent contract than that created by such an indorsement. We see no reason to doubt that, under the circumstances of this case, it was competent for the defendant to give the guaranty here in question. It is to be presumed the vice-president had rightfully the power he assumed to exercise, and the defendant is estopped to deny it."

Sturges & Co. v. *The Bank of Circleville*, 11 Ohio St. 153, already referred to, page 66, *supra*, was very similar in its facts to the case last mentioned—the cashier of the defendant bank having sold to the plaintiffs a negotiable note with warranty that it was good, and the action being upon the warranty. The authority of the cashier to make the warranty being denied, the Court, speaking through Sutliff, J., said (p. 167):

"It is not claimed that the respective duties of the board of directors, president and cashier, in the exercise of the franchises of the bank, are prescribed by the charter. So far, therefore, as the limitation of the appropriate duties of the cashier depend upon his office, we can only have respect to the ordinary and well-understood duties of that officer in determining his powers. A cashier is defined to be one who has charge of money, or who superintends the books, payments and receipts of a bank or moneyed institution. His actual power and duties, like those of all other agents, may be more or less qualified, restricted or enlarged by the corporation, institution or party for whom he acts. But in this case, there being nothing to show any restriction or qualification of his powers in that regard, the duties of the cashier may reasonably be understood to extend to the buying and selling, and negotiating bills of exchange, checks and promissory notes, as well as to that of borrowing money, as the agent of the bank."

Thus far we have considered only evidence of which the Court must take judicial notice, that the usage of banking clothes both presidents and cashiers with authority to borrow money for their banks.

But the case does not stop here. Directors of banks are presumed to know not only those usages which are so well known that the courts notice them without proof, but those special and peculiar usages as to banking which prevail in the places where their bank does its ordinary business. They are presumed not only to know them but to adopt them, and to conduct their business according to them, except in so far, and as to those persons, to whom they have given notice to the contrary. This presumption, which is obligatory on persons who deal with the bank (*Bank of Washington* v. *Triplett*, 1 Peters, 25, 32–34; *Lincoln & Kennebeck Bank* v. *Page*, 9 Mass. 155), is equally obligatory upon the bank and all its officers. *Neiffer* v. *Bank of*

Knoxville, 1 Head, 162; *Crain* v. *National Bank*, 114 Ill. 516; *Merchants' Bank* v. *State Bank*, 10 Wall. 604, 641, 644.

The evidence is undisputed and conclusive that by the usage of banking, as practiced both in Cincinnati and New York, where a bank desired to borrow money the loan was always negotiated by one of its executive officers, without ever showing, or being called upon to show, proof of his authority so to do.

Every bank acted upon the assumption that such an act was within the scope of the officer's official duty, and needed no fortification by the production of either a special or general resolution or by-law passed by the board of directors.

We need not give again the names and qualifications of the witnessess as we have mentioned those *supra*, p. 71; but we desire to quote part of the testimony of some of them on this point.

Dumont Clarke, president of the American Exchange National Bank of New York, after saying that borrowing money was a very common occurrence in the banking business, prior to the decision of the *Western National Bank* case, said (Rec., p. 135):

"Q. 9. Who acted for the borrowing bank in such a case? A. At times the cashier, and at times the president, either one of the officers.

"Q. 10. Did the lending bank, prior to that decision, ever require proof of the authority of the officers of the borrowing bank in the shape of a resolution by the directors authorizing the loan? A. No, sir; we never required any thing like that."

A. B. Hepburn, president of the Third National Bank of New York, having first testified to the existence of that usage, said (Rec., p. 137):

"Q. 10. Who acted for the borrowing bank in such transactions? A. Either of the executive officers; cashier or president.

"Q. 11. How about the vice-president? A. Or vice-president or assistant cashier. Any of the executive officers.

"Q. 12. What proof, if any, did the lending bank require as to the authority of the officers of the borrowing bank to make application for the loan? A. Genuineness of the signature to the application, as well as the correspondence, and they protected themselves by passing the money to the credit of the borrowing bank upon the books of the lending bank, so that it could only be drawn out by the checks of the officers in the regular course of business.

"Q. 13. Prior to that decision, did the lending bank ever require the passage of resolutions by the board of directors of the borrowing bank directing the making of the loan and authorizing it? A. I never knew of such an instance. It was not a usual thing at all.

"Q. 14. Was or was not the borrowing of money one of the matters that fell within the ordinary scope of the duties of the cashier and vice-president of the bank? A. It was."

Edward Townsend, cashier of the Importers' and Traders' National Bank of New York, having first testified to the existence of the same usage, said (Rec., p. 149):

"Q. 5. Who acted for the borrowing bank whenever it desired to borrow money? A. Any official whose signature was authorized with us.

"Q. 6. And what officials was it customary to give authorization to for signature? A. Generally the president and cashier, and frequently the vice-president and assistant cashier, also.

"Q. 7. Did the lending bank prior to that decision ever require proof of authorization to make the loan in

the form of a resolution of the board of directors of the borrowing bank? A. Never to my knowledge."

George F. Baker, president of the First National Bank of New York, having testified to the same usage, said (Rec., p. 150):

"Q. 5. Who acted for the borrowing bank when a loan was to be made? A. Any of its officers.

"Q. 6. When you say any of its officers, whom do you class as officers? A. Generally the president or cashier, and occasionally a director.

"Q. 7. How about the vice-president? A. The vice-president; yes, sir.

"Q. 8. In such cases did the lending bank require the proof of authority of the officer of the borrowing bank making application for the loan in the form of a resolution of the board of directors authorizing the making of the loan? A. No, sir."

Frederick D. Tappan, president of the Gallatin National Bank of New York, having testified to the same usage said (Rec., p. 152):

"Q. 8. In the making of such loan who acted for the borrowing bank? A. Either the cashier or president.

"Q. 9. How about the vice-president? A. The vice-president, in the absence of the president. In some cases the vice-president is the more active man; not usually, but there have been cases where the vice-president has been the more active man of the two.

"Q. 10. And in such cases he would be the person naturally to act? A. Yes, sir.

"Q. 11. In making such loans did the loaning bank require proof of the authority of the officer of the borrowing bank making the application, by a resolution of the board of directors, prior to this decision of which I have spoken? A. I think not.

"Q. 12. When you say you think not, how positive is your information upon this point? A. That they never

have required a resolution of the board of directors of the borrowing bank."

W. S. Rowe, cashier of the First National Bank of Cincinnati, said (Rec., p. 186):

"Q. 9. Mr. Rowe, tell us whether or not, prior to the decision of the Supreme Court of the United States, in the case of *The Western National Bank* v. *Armstrong, receiver of the Fidelity National Bank*, in the spring of 1894, about a year ago, it was considered within the scope of the duties of the cashier of a bank to borrow money for his bank? A. Yes, it was.

"Q. 10. What, if any thing, was required by the lending bank, beyond the application of the cashier or one of his superior officers—the president or the vice-president of the bank? A. Our rediscounting for country banks, for the loaning of the money, was usually done by correspondence, and the letter would be signed by either the president, vice-president or cashier. If it was a rediscount we took their acceptable business paper, with their indorsement; if it was a direct loan we took the note of the bank, signed by one of the three officers I have named, with municipal bonds, or other good bonds as collateral, without any thing else.

"Q. 11. Was any resolution of the board of directors required? A. No, sir.

"Q. 12. Do you know whether that was usual in banking—in the banking business, prior to 1894? A. It was not, so far as my knowledge goes."

G. P. Griffith, vice-president of the Citizens National Bank of Cincinnati, having testified that borrowing money was a usual thing, said (Rec. p. 196):

"Q. 9. Mr. Griffith, please state whether or not, prior to that decision, it was a usual thing for the lending bank to require from the borrowing bank a resolution of the board of directors authorizing the loan. A. Never.

"Q. 10. State whether or not the borrowing of money for a bank, from another bank, was one of the duties incident to the office of cashier, president or vice-president, or either of them? A. Well, I don't think you put your question right—

"Q. 11. Well, just answer the question according to your knowledge of the facts, please? A. It is customary to make loans to correspondent banks when applied for either by the president, vice-president or cashier of said bank.

"Q. 12. Was proof ever demanded as to the authority of either of the officers you have named to make the loan? A. Not to my knowledge or memory."

J. D. Hearne, President of the Third National Bank of Cincinnati, having testified to the same practice, said (Rec., p. 200):

"Q. 4. State whether, prior to that decision, it was customary for the lending bank to require from the borrowing bank the passage of a resolution by its board of directors, authorizing the loan? A. It was not.

"Q. 5. Was the passage of such a resolution ever required by the lending bank, so far as your knowledge goes? A. It never was, so far as my knowledge and experience goes.

"Q. 6. Mr. Hearne, what officers acted for the borrowing bank in such transactions? A. The managing officers; either the president, or the cashier, as the case might be.

"Q. 7. How about the vice-president? A. The vice-president would act if he were an active officer.

"Q. 8. What proof, if any, did the lending bank require of the authority of either, or any, of these officers to make the loan, more than the knowledge of the fact that they held their respective positions? A. Did not require any.

"Q. 9. Mr. Hearne, did it, or not, fall within the scope of the duties of the cashier, president, or vice-presi-

dent to borrow money on behalf of his bank from another bank? A. It did. It was so regarded."

Evidence to like effect was given by George G. Williams and William J. Quinlan, the president and cashier of the Chemical National Bank (Rec., p. 130, Q. 9, XQQ. 1–5: Rec., pp. 123, 124, QQ. 17–21, XQQ. 3–7), and also by M. M. White and H. C. Yergason, presidents of the Fourth and Merchants' National Bank of Cincinnati (Rec., pp. 166–168, QQ. 7–17, and p. 193, QQ. 5–10.

Abdication. As we have said in the statement of the case, the directors of the Fidelity Bank practically intrusted the whole management to Harper. Evidence of the strongest nature to this effect is furnished by the minutes of the board of directors, Rec., pp. 247–259, from which it appears that the only business ever done by the directors was the election of officers and fixing of their salaries, the enactment of by-laws, the declaration of two dividends, the ratification of the action of the officers in purchasing government bonds to be deposited as security for government deposits, and the taking steps in an improper way toward the increase of the capital stock. Absolutely no control or supervision was reserved or exercised over the business of the bank, not even in the matter of discounts. At the last meeting held by the board, Mr. Kineon, who had frequently theretofore endeavored to induce Mr. Swift, the president of the bank, to bring the discounts before the board, offered a resolution looking to the examination of the discounted paper by a committee, Rec., p. 259; and his showing this insubordination resulted in his retirement from the board. The story will be found in his evidence, pages 178–184. He was a director of the bank from the beginning until May 10, 1887, when the events took place

to which we have just referred. In his testimony he says (Rec., p. 178):

"Q. 6. Up to the time when you quit, Mr. Kineon, who was the active officer managing the bank? A. Mr. Harper—E. L. Harper.

"Q. 7. What was his official position? A. He was vice-president.

"Q. 8. What did he do with reference to the bank? A. He did every thing; he ran the whole bank.

"Q. 9. Did the directors know that he was running the whole bank? A. Well, I guess they were aware that he had charge. I don't know why they didn't."

Mr. Franklin Alter was a director at the organization of the bank and remained such until the annual election in January, 1887. He testified as follows (Rec., p. 172):

"Q. 6. Mr. Alter, state, during that time, who had the practical control and management of the Fidelity National Bank? A. E. L. Harper.

"Q. 7. Was that known to all of the board of directors? A. Yes.

"Q. 8. Was it with their consent and approval that Harper managed the bank! A. Yes.

"Q. 9. Were the directors advised of the transactions of the bank, in the way of loans and discounts, and cash items, and other things of that kind? A. I don't think they ever were, in detail, unless they went outside and got their information from other sources.

"Q. 10. They practically entrusted the whole management of the bank to Harper? A. Yes.

"Q. 11. What was E. L. Harper's position in the Fidelity? A. He was vice-president.

In the history of the bank Mr. Alter showed a tendency to do his duties in more than a perfunctory manner. He wished to investigate the fitness of Harper, Baldwin, and the assistant cashier, Hopkins, for their respective

offices; he wished also to investigate as to the condition of the bank. He was rebuffed, and naturally ceased his efforts, and was dropped from the board at the first opportunity. The story will be found in his testimony (Rec., pp. 172–176).

The testimony given by these two members of the board of directors is confirmed by that given by C. A. Hinsch, one of the receiving tellers (Rec., pp. 176–178), A. P. Gahr, another member of the board and confidential secretary of Harper (Rec., pp. 202–204), and J. H. Watters, general bookkeeper (Rec., pp. 235, 236, questions 52–63); nor is it anywhere contradicted by evidence offered by the appellant. The only witnesses called by him who alluded to this subject were J. H. Matthews and Henry Pogue. Mr. Matthews was a brother-in-law of Harper and a member the board of directors. He was elected upon the first board in 1886, but immediately resigned (Rec., p. 247). He was again elected in January, 1887, taking Mr. Alter's place, and served during the residue of the existence of the bank. He was not examined in chief as to the conduct of the board (Rec., p. 237), but on cross-examination he confirms the testimony of the other witnesses; for the only instance which he can recall when the management of the bank was discussed in the board was what occurred at the meeting when Mr. Kineon resigned (Rec., p. 239; QQ. 16–21, and p. 242, Q. 48), and his testimony shows that Mr. Harper was not merely the dominant spirit, but the actual controller of the bank.

Mr. Pogue was elected a director to succeed Matthews at the formation of the bank, and continued to the end. All that he said on examination in chief upon this question is (Rec., p. 243):

"Q. 4. Were you an active director, Mr. Pogue, dur-

ing the whole time? A. Well, yes; I suppose all the directors are supposed to be active; we all took an active interest in the affairs of the bank."

On cross-examination he states that there was a loan committee composed of the active officers of the bank (Rec., p. 244, XQ. 4, referring, we suppose, to by-law 17, Rec., p. 252). Being asked wherein the directors displayed their activity in managing the bank, he said that the directors did not manage it, but the officers did; that the directors met at stated times and had reports from the officers which were spread upon the minutes; that the only instance he can recall in which the directors of their own motion sought for any information was again at that meeting when Kineon's request for information brought about his resignation; that with that one exception the directors left the management of the bank to the board of officers; that Harper was the active managing man on that board and of the bank; and that the directors never looked into the cash account (Rec., pp. 244, 245, XQQ. 5–17). The minutes show that reports like those Mr. Pogue speaks of were not made. The only reports there appearing are one of the business done on the day the bank opened, and another of the resources and liabilities on December 23, 1886 (Rec., pp. 248–249, 254–255).

The subordinates in the bank knew of the entries which Harper caused to be made, transferring funds in the cases of the loans by the Chemical Bank and the First National Bank of New York; for without their assistance those entries could not have been made. They must also have known of the abstraction of the collaterals which went to secure the loans which Harper made in New York in the name of the Fidelity Bank at those times; for it is inconceivable that assets of the bank of so large an amount should

have been abstracted from its vaults without their knowledge. The inquiry suggested by Mr. Kineon, and which the directors declined to pursue until Kineon was retired from the board, would have disclosed that abstraction and the transactions connected with it if faithfully pursued.

The bill of complaint which the receiver filed against the directors shows discounts in many cases far in excess of the limitations imposed by Rev. Stat., section 5200. These transactions must have become known to the directors if they had been willing to give even the most perfunctory attention to the performance of their duties.

The 22d by-law of the bank prohibited in terms the carrying of cash items as cash (Rec., p. 252); yet Harper was permitted to direct this to be done (Rec., p. 177), and the extent to which it was done appears in that bill; and some of the directors were also favored in this way (Rec., p. 212). In the final throes Harper, without authority from the directors sent away over $1,000,000 of the bills receivable of the bank to secure a further loan from the Chemical Bank. This transaction was never questioned either by the directors or by the receiver. The collections from those securities are shown in Watters Exhibits 8 and 9 which have not been printed in full (Rec., pp. 115, 116). But the New York decree (Rec. p. 26) shows that these collections left, after satisfying the June loan, a balance of $271,808.34 in the hands of the Chemical Bank; and Armstrong Exhibits Nos. 7 and 8 show that there were still uncollected other securities amounting to many thousands of dollars.

The evidence, therefore, fully warrants the assertion that the board of directors intrusted the bank to Harper, and practically gave him *carte blanche* to manage it as he saw fit. In no way did they attempt to watch over, direct, or control his actions. In 1887 a majority of them were

his nominees, and held their positions at his will, viz: Baldwin, Hopkins, Gahr and Matthews, besides himself. The stock in the name of these four men was really held by Harper (Rec., p. 173, QQ. 18, 19; p. 202, Q. 5; p. 238, QQ. 6 and 7). The stock ledger accounts of Harper, Matthews and Gahr are given on record pages 302–305; and an analysis of these will show that in February, 1887, Harper, in their names and in his own, was the registered owner of over $390,000 of the capital stock of the bank, its whole capital being only $1,000,000. Because of his overwhelming personal interest in its affairs, and because of their confidence in his ability and trust in his integrity, the directors of the bank practically abdicated their positions and suffered him to be dictator. They have paid out of their own pockets for this confidence and misplaced trust, as is shown by the bill of complaint filed against them by Armstrong and the decree thereon (Rec., pp. 271–289, 291 and 294). But this is not the only result which follows; for it is well settled that such conduct by a board of directors is a delegation to the dictator thus created by them of every power which he has in fact exercised, and which they might in law delegate.

Martin v. *Webb*, 110 U. S. 7, 14.

Glidden & Joy Varnish Co. v. *Interstate National Bank*, 32 U. S. Appeals, 664; 69 Fed. 912.

Davenport v. *Stone*, 104 Mich. 521.

Wing v. *Commercial and Savings Bank*, 103 Mich. 565.

First National Bank of Kalamazoo v. *Stone*, 106 Mich. 367.

City Bank of New Haven v. *Perkins*, 4 Bosworth, 420.

Martin v. *Webb*, 110 U. S. 7, is pertinent to many aspects of the case at bar. The question involved was

whether a bank was estopped to deny the authority of its cashier to cancel certain notes held by it, and the deed of trust securing them, without payment. The evidence showed that the cashier had been given practical control of the bank, as Harper was in the case at bar. And thereupon the Court held the bank estopped by his act, although that act was one which confessedly did not fall within the scope of his apparent authority. The Court said, speaking through Mr. Justice Harlan, and referring to the powers of the cashier (page 14) :

"Ordinarily, he has no power to discharge a debtor without payment, nor to surrender the assets or securities of the bank. And, strictly speaking, he may not, in the absence of authority conferred by the directors, cancel its deeds of trust given as security for money loaned—certainly not, unless the debt secured is paid. As the executive officer of the bank, he transacts its business under the orders and supervision of the board of directors. He is their arm in the management of its financial operations. While these propositions are recognized in the adjudged cases as sound, it is clear that a banking corporation may be represented by its cashier—at least where its charter does not otherwise provide—in transactions outside of his ordinary duties, without his authority to do so being in writing, or appearing upon the record of the proceedings of the directors. His authority may be by parol and collected from circumstances. It may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been allowed, without interference, to conduct the affairs of the bank. It may be implied from the conduct or acquiescence of the corporation, as represented by the board of directors. When, during a series of years, or in numerous business transactions, he has been permitted, without objection and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between the bank and those who in good faith deal with it upon the basis of his authority to represent the corpora-

tion, that he has acted in conformity with instructions received from those who have the right to control its operations. Directors can not, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect the officers of the bank, and to make declarations of dividends. That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

The judgment in *City Bank* v. *Perkins*, 4 Bosw. 420, was affirmed in the Court of Appeals, 29 N. Y. 554. But the opinion in the Court below has been frequently cited and its reasoning approved by other Courts, and for that reason and because of the force with which the opinion is stated, although it is that of an inferior tribunal, it is worthy of the serious consideration of this Court. The question involved was as to the liability of a bank for money borrowed in its name by its defaulting cashier, McMillen; and on page 441 the Court said:

"McMillen, as such cashier, had authority to borrow money for the Bank of Akron. To what extent he borrowed for the bank, the evidence does not disclose. He had, practically, the whole management of the business of that bank. Its board of directors met semi-annually, but according to the evidence before us did not, at those meetings, or at other times, inquire as to the details of its business, the mode of its operations, or into the manner in which the cashier was prosecuting its business.

"Under such circumstances, we think the plaintiffs are entitled to have this controversy determined upon the prin-

ciple, that as between them and the Bank of Akron, the cashier of the latter was fully authorized to borrow money for it, and in its name, and that any loan made by the plaintiffs, in good faith, on an application of the cashier of the Akron Bank, as such cashier to borrow for it, is a loan to that bank, and that such bank is primarily liable for such loan, as the party borrowing."

And again on page 444 it was said:

"There is no pretense that the nature and extent of the authority of the cashier of the Bank of Akron have ever been defined by any direct act of the corporation. On the contrary, he has been permitted, as being within the scope and limits of his authority, to exercise a large range of powers, and his own judgment as to the transactions which he deemed to be for the interest of the bank, and the terms on which he should contract, in making engagements as its agent, which the bank might lawfully make.

"Such exclusive control and management for so long a period by the cashier, with the assent of the directors, amounts to an authority to him to make contracts, in relation to its business which the bank might lawfully make, and will conclude the bank as between it and a party who has dealt directly with it through such cashier, and who, on the faith of his having authority to make such a contract, has loaned money to, or paid it for such bank."

Not only the case just cited, but all others cited in the same connection, were cases as to the responsibility of banks for actions of their officers without explicit authority from their boards of directors, and they have been selected for this reason. Had we extended the citations so as to cover other classes of corporations, the list might have been extended almost indefinitely.

The case of *Wing* v. *The Commercial and Savings Bank*, 103 Mich. 565, was as to the authority of Fuller, the cashier of the defendant bank, to release parties liable on commer-

cial paper held by it. The scope of action left open to Fuller resembles greatly that permitted Harper; for the Court say, page 569:

"It is not claimed that any of the other directors or officers of the defendant bank had any actual knowledge of these transactions, or took any part in them. Fuller and his relatives and personal friends, all of them non-residents of Ludington [the place where the bank was located], owned a majority of the stock of the defendant bank; and Fuller, as he often boasted, was the sole manager, and could do any thing he pleased in relation to the management of the bank. He openly asserted this on different occasions, and his course of conduct lent all possible color to the claim. He advanced the money of the bank to build a club house in the city of Ludington. He took stock in manufacturing companies, and did other extraordinary things for the cashier of a bank to do, without any protest on the part of the resident directors of the bank. The directorate was made up of men totally unacquainted with banking, men engrossed in other affairs, and who had neither time nor inclination to look after the affairs of the bank. They voluntarily left all matters to the discretion of Fuller; seldom held meetings of the directors; and it is uncertain, under the evidence, whether a meeting was held between the 1st of April and the 15th of August of the year 1892. . . . It appears from all the testimony that the boast of Fuller that he controlled the bank was not an empty or idle one by any means. It does not appear that the outside stockholders took their stock on the express condition that Fuller should have absolute control, or that there was any express agreement to that effect. It does not appear whether the directors had actually voted to confer unusual powers upon Fuller, but it does appear that he claimed and exercised them without let or hindrance on all occasions. He was by sufferance, if by no other authority, something more than a cashier; he was the manager of the bank."

The rule of law applicable to actions of an agent acting under the circumstances just detailed is expressed by the Court on page 576, as follows:

"The rule undoubtedly is that usually the authority of a cashier of a bank is a limited authority, and that a party seeking to show a release by the cashier from liability upon commercial paper held by the bank, except in the ordinary course, must show that the cashier had authority from the directorate, or that the act had been ratified or acquiesced in by the bank. That authority, however, may be shown expressly or by necessary implication, or it may be established by the particular usage, practice, or mode of doing business by the bank. If a cashier be allowed to exercise general authority in respect to the business of the bank for a considerable time,—in other words, if he is held out to the public as having authority in the premises,—the bank is bound by his acts, as in case of an agent of any other corporation, by whatever name he may be designated, in the same manner as if they were expressly granted. The directorate of a bank can not be permitted to neglect its duties, abandon the management to the cashier, permit him openly and notoriously and without rebuke to deal with the public as having authority and then escape responsibility."

IV. THE CHEMICAL NATIONAL BANK WAS NOT REQUIRED TO SEE THAT POWER TO BORROW THIS MONEY HAD BEEN DELEGATED, BUT MIGHT PRESUME THE LOAN WAS AUTHORIZED.

This is but a concrete statement of the abstract propositions heretofore discussed; their application to the facts of this case. Those facts, briefly restated, are that it is a usual thing for one bank to borrow money from another; that the form of the loan is by rediscount of paper already held by the borrowing bank, or by original discount of a note made by it, or for its accommodation and indorsed by it,

or upon its certificate of deposit to the order of one of its officers, or upon its simple request in writing—collateral security being usually required when the loan was not a rediscount of existing paper. The request for the loan was always made by one of the executive officers of the bank, president or cashier, or, if active officers, vice-president or assistant cashier. No proof of authorization of the loan by the directors, or of general or special delegation of authority to make it, was ever required, appointment to the office being considered as giving credence and the right, as well as the duty, to speak for the bank.

All these features are present in this case. The two banks concerned were correspondents, the lending bank being a New York depository and reserve agent of the borrowing bank—the most natural source to be applied to for a loan; the request came from the vice-president of the Fidelity Bank; it carried with it the usual evidences of its genuineness, viz., a certificate of deposit issued by the Fidelity Bank, in favor of the officer making the request, and bills receivable as collateral; and it was fortified and shown to be made with the approval of the cashier by his signature to this certificate of deposit. Every thing, therefore, was regular upon its face, nor was there any thing to excite suspicion. And it will be remembered that this was done, not by any usage peculiar to these two banks, but in accordance with the usage of all banks. Such is the testimony for the appellee, and, as observed by the Court below (Rec., p. 345):

"The failure of the defendant to call witnesses to contradict the evidence of the complainant upon the question of usage, lends most significant support to the view that it was well known and generally acquiesced in."

To the same purport is the language of Judge Sage in the Circuit Court (Rec., p. 309):

"All this testimony is uncontroverted, and it is quite significant that although Receiver Armstrong was himself an old and experienced banker, it was not until after the decision of *Western National Bank* v. *Armstrong* that the point was made that the negotiation of the loan upon which this suit is based was outside the ordinary course of business in banking, and not within the authority of the line of the duties of the vice-president of the Fidelity Bank."

It is now contended, however, that the banks of the country did not know how to conduct their business; and that they could not safely make a loan to another bank without having evidence that it was authorized by the directors of that bank. The cashier is the executive officer of a bank, and the person through whom decisions of its board of directors are ordinarily communicated to the outside world. Hitherto they had been trusting to his assurance that the loan was authorized, given it is true by implication, but still necessarily given whenever the request came through him. Of what avail, therefore, to ask any further assurance when the request for the loan comes through the cashier. If he gave a written statement, that might be false. Even if a certified copy of resolutions passed by the directors were demanded, yet this certificate would be made by the cashier, and might again be false—indeed, would be false if the cashier were perpetrating a fraud. Suppose such a false certificate were given, would the bank nevertheless be liable? This might be doubted, for the agency of the cashier is to certify what appears upon the minutes, and not as to what does not there appear. *Pollard* v. *Vinton*, 105 U. S. 7. And if it be said that nevertheless the scope of his authority is to give certificates, so it may be answered the scope of the authority

of the master of a vessel is to give bills of lading; and that in each case the authority is limited to certifying to the truth, and does not extend to creating a liability by certifying a falsehood. And furthermore, as the cashier is the executive officer of the bank, it falls within the scope of his authority to conduct the business of the bank as authorized by the board of directors just as much as, as secretary of that board, it falls within his duty to give certificates as to their proceedings. Introducing this novelty of requiring a certified copy of a resolution by the board of directors does not serve to protect banks against frauds by their cashiers, for the cashier who would borrow without authority would not hesitate to forge proof of the authority; and the claim of the lending bank based upon such forgery can be sustained only by a process of reasoning which, in its full development, would sustain its claim upon the representation of the cashier without the forgery accompanying it. The only safe course for a lending bank to take, if this rule as to the necessity of an express delegation of authority shall prevail, will be to have a delegate present at the meeting of the board of directors of the borrowing bank, able to testify thereafter as to what then occurred.

What was said in the case of the *Western National Bank* v. *Armstrong*, 152 U. S. 346, with reference to the necessity of special delegation of authority and proof thereof, was said without the information now laid before the Court as to the nature of the banking business, and the manner in which it is conducted. To apply the rule there laid down to the different state of facts shown by this record, would be not only to overthrow a long line of decisions as to the banking business, but to shake to their foundation principles heretofore considered settled beyond debate in the law of corporations and that of agency. In the leading case in England of *Royal British Bank* v. *Turquand*, 6 E. &

B. 327 (Exchequer Chamber; reported below in 5 E. & B. 248), the question was raised as to the indebtedness of a corporation upon a loan made by its board of directors, whose authority to borrow depended upon the passage of a resolution at a general meeting of the company. The Exchequer Chamber, through Jervis, C. J., said, p. 332:

"We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have the right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done."

It will be remembered that the deed of settlement of an English corporation is equivalent to the charter of an American corporation—an instrument filed in a public office so as to be accessible to the world at large. The information given there by the statute and deed of settlement as to the powers of a corporation and the limitations thereon, is that which is given with reference to a national bank by the statutes of the United States, and the articles of association which are filed with the Comptroller of the Currency. But as these articles are required, and can be expected, to contain only the matters specified in Revised Statutes, section 5134, really the only source of information as to powers and limitations to be examined by one dealing with a national bank is the statute book. The effect of the decision just cited is that where the directors of a bank are exercising powers conferred by statute or charter only upon condition of previous authorization by the body

of stockholders, one dealing with the directors may rightfully assume that the stockholders have given the necessary authorization; he is not required to demand an inspection of the minutes of the stockholders' meetings, or a certified copy of their action. It comes within the apparent scope of authority of the directors to borrow money; if the loan effected by them is beyond the actual limit of their authority, the loss must fall upon those who put them in office and enabled them to deceive the outside world. The rule thus applied to the actions of the directors is equally applicable to the actions of all other officers of the corporation. In short, if borrowing money be within the power of the corporation, and if the officer effecting a loan be the one through whom, in the proper course of business, a loan should be negotiated, then the lender need not seek proof of special authorization. It is only an application of the general principle in the law of agency, that knowledge of limitations upon the powers of a general agent must be forced upon, and not sought by, one who deals with him.

So in the *Colonial Bank of Australia* v. *Willian*, L. R., 5 P. C. 417, it was held (*italics* ours):

"Where a public company has been incorporated by virtue of a statute which prescribed certain rules for the constitutions of such companies, and for regulating their proceedings; it will be assumed *in judging of the transactions between the company and other parties, that the requirements of the statute have been complied with.*"

To the same effect are *Agar* v. *The Athenæum Life Association Society*, 3 C. B., N. S. 725, and *Prince of Wales Life & Ed. S. Co.* v. *Harding*, E. B. & E. 183.

The latest English case upon the subject is *Biggerstaff* v. *Rowatt's Wharf, Limited*, and *Howard* v. *Same*, [1896]

2 Ch. 93. The decision was by Lords Justice Lindley, Lopes and Kay in the Court of Appeal, and its importance and applicability to the case at bar justify us in stating it somewhat in detail. The defendant company was a corporation conducting a wharf. Its articles authorized the directors to appoint a managing director, and to confer upon him such of the powers of the board as they saw fit, other than the drawing, accepting or indorsing bills of exchange or promissory notes. Mr. Davy had been recognized and was acting as managing director, but there was nothing upon the directors' minute book to show either his appointment or what powers were conferred upon him. At the time of the transactions in question the board consisted of three members. On October 20, 1894, Harvey, Brand & Company discovered that the defendant company had misappropriated sundry barrels of which it was warehouseman. On October 22, 1894, a meeting occurred between Harvey, Brand & Co. and the three directors of the defendant, at which the former threatened criminal proceedings, and demanded the transfer to them of sundry securities held by the company. The meeting was postponed to the next day, when one of the directors was absent; and representation being made that the company had no money to pay wages, and must close the wharf unless they could get an advance, Harvey, Brand & Co., having interests which would suffer if the wharf were closed, agreed to advance the money for wages, upon getting security for the advance and for the moneys due them on the prior transactions. The managing director then gave them the security desired. On October 30, 1894, the defendant company went into the hands of a receiver; and at that time Harvey, Brand & Co. were indebted to it for storage. The cause is reported upon their claim to set off the moneys due them for the advance and the preceding misappropriation against the claim

for storage, and to be paid moneys which had been collected by the receiver on claims hypothecated to them. Upon this subject the members of the Court spoke as follows:

Lindley, L. J. (p. 102): "It is said that the company is not bound by those orders [the assignments to Harvey, Brand & Co.] because Mr. Davy had no authority to give them. Now, what is the law as to this point? What must persons look to when they deal with directors? They must see whether, according to the constitution of the company, the directors could have the powers which they are purporting to exercise. Here the articles enabled the directors to give to the managing director all the powers of the directors, except as to drawing, accepting, or indorsing bills of exchange and promissory notes. The persons dealing with him must look to the articles, and see that the managing director might have power to do what he purports to do, and that is enough for a person dealing with him *bona fide*. It is settled by a long string of authorities that where directors give a security which according to the articles they might have power to give, the person taking it is entitled to assume that they had the power. The hypothecations, therefore, are in my opinion valid."

Lopes, L. J., p. 103, after discussing some other questions, says:

"The question as to the hypothecation of debts is quite distinct. It is said that the managing director had no power to hypothecate them. There is no doubt that Mr. Davy was managing director, and acted as such, and, according to the articles the directors could have given him the power which he purported to exercise. There is an absence of evidence that they have done so; but is that enough to make his acts void? In Lindley on Companies, 5th ed., p. 159, the law is thus laid down: 'Upon principle, therefore, where persons are in fact employed by di-

rectors to transact business for a company the authority of those persons to bind a company within the scope of their employment can not be denied by the company, unless (1) their employment was altogether beyond the powers of the directors; or unless (2) the persons employed have been appointed irregularly, and those who dealt with them had notice of the irregularity. Where the power to appoint an agent for a given purpose exists, irregularity in its exercise is immaterial to a person dealing with the agent *bona fide* and without notice of the irregularity in his appointment. The following cases are important on this point. In *Smith* v. *Hull Glass Co.*, 8 C. B. 668, 11 C. B. 897, it was held that a company registered under 7 and 8 Vict., c. 110, was liable to pay for goods ordered by persons in its employ, and that it was not necessary for the plaintiff to prove that those persons were authorized by the directors to order the goods in question. Maule J. went further than this, and his judgment is an authority for the broad proposition that a company is bound by the acts of persons who take upon themselves, with the knowledge of the directors, to act for the company, provided such persons act within the limits of their apparent authority; and that strangers dealing *bona fide* with such persons, have a right to assume that they have been duly appointed. This view is in accordance with later authorities.'

"Every word of that applies here. It can not be said but that Mr. Davy was acting within the limits of his apparent authority, or that Harvey, Brand & Co. were not acting *bona fide*, or that they had not a right to assume that Mr. Davy was duly appointed."

Kay, L. J., said, page 106: "Whether Mr. Davy had been formally appointed managing director does not signify; he acted and was recognized as such. By the articles the directors were authorized to delegate to him all their powers except the drawing, indorsing, and accepting bills of exchange and promissory notes. Mr. Davy, therefore, did nothing *ultra vires* of a managing director; and it would be extraordinary if a person dealing *bona fide* with the manag-

ing director of the company were bound to inquire whether the powers which the articles authorized the directors to give him had been formally delegated to him. There is a long string of cases shewing that a person so dealing with an officer of a company has a right to presume that all has been done regularly."

The principles underlying the decision just quoted have been repeatedly affirmed by this Court. Upon them rest the long line of decisions as to the effect of recitals in city and county bonds, which are so familiar that it will be necessary only to refer to the subject generally, and specifically to the case of *Moran* v. *Commissioners of Miami County*, 2 Black, 722, where (page 724) the opinion in *Royal British Bank* v. *Turquand*, 6 E. & B. 327, was quoted at length and approved. Upon this reasoning rests the decision in *Merchants' Bank* v. *State Bank*, 10 Wallace, 604, where the Court, speaking through Mr. Justice Swayne, in words which, with reference to the credit which may rightfully be given to the acts and declarations of cashiers and vice-presidents of banks, are fully applicable to the case at bar, said (p. 644):

"Where a party deals with a corporation in good faith—the transaction is not *ultra vires*—and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists.

"If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them."

"The principle has become axiomatic in the law of corporations, and by no tribunal has it been applied with more firmness and vigor than by this Court.

"Estoppel *in pais* presupposes an error or a fault and implies an act in itself invalid. The rule proceeds upon the consideration that the author of the misfortune shall not himself escape the consequences and cast the burden upon another. Smith was the cashier of the State Bank. As such he approached the Merchants' Bank. The bank did not approach him. Upon the faith of his acts and declarations it parted with its property. The misfortune occurred through him, and as the case appears in the record, upon the plainest principles of justice, the loss should fall upon the defendant. The ethics and the law of the case alike require this result.

"Those who created the trust, appointed the trustee and clothed him with the powers that enabled him to mislead, if there were any misleading, ought to suffer rather than the other party.

"Smith, by his conduct, if not by his declarations, avowed his authority to buy the certificates and gold in question from the Merchants' Bank, and the bank, under the circumstances, had a right to believe him."

The case of *Barnes* v. *Ontario Bank*, 19 N. Y. 152, is of acknowledged authority, and was cited with approval in *Merchants' Bank* v. *State Bank*, 10 Wallace, 650. There the cashier of the defendant bank, without the authority or knowledge of its board of directors or other officers, had procured the discount of its certificate of deposit issued without any deposit having, in fact, been made. The proceeds of the discount were placed to its credit with its New York correspondent, but no entry of any kind relating to the transaction appeared upon the books of the defendant bank. The Court held the bank liable upon the certificate, and in the principal opinion it was said (p. 156):

"The first questions presented are, whether the bank had power to borrow the money, and whether the cashier was a proper agent to execute that power without any special delegation of authority thus to act. That the power

to borrow existed, was determined by this Court, upon the fullest examination, in the case of *Curtis* v. *Leavitt*, 15 N. Y. 9. That the cashier, in virtue of his general employment, could exercise the power, was not denied upon the argument, and the proposition does not admit of a reasonable doubt."

The counsel who argued the case were Francis Kernan for the bank, and Nicholas Hill for the certificate holder—two of the most prominent lawyers of that day in the State of New York. The principle there decided was again affirmed by that Court in *Coats* v. *Donnell*, 94 N. Y. 168, where it was said (page 176):

"The cashier of a bank is its executive officer, and it is well settled that as incident to his office he has authority, implied from his official designation as cashier, to borrow money for, and to bind the bank for its repayment, and the assumption of such authority by the cashier will conclude the bank as against third persons who have no notice of his want of authority in the particular transaction, and deal with him upon the basis of its existence."

In *Donnell* v. *The Lewis County Savings Bank*, 80 Mo. 165, the plaintiffs were the same New York banking firm as in the previous case, and were again attempting to sustain a loan which they had made to a Western bank upon an obligation executed in its name by one of its officers without authority expressly delegated by its board of directors, viz., a note signed by the cashier individually, payable to the order of the bank and indorsed by the bank through its president, which the plaintiffs had discounted, knowing it to be what bankers call "made paper," that is, paper without real consideration as between the parties, and made up merely to evidence the loan. The authority of the defendant bank to borrow money, and that of its officers to bind it upon such paper, were challenged and

denied by the Court below. This judgment was reversed, and the Court sustained the authority of any corporation, having general banking powers, to borrow, and also the apparent scope of the authority of the cashier to execute such power, and held that one dealing with him need not prove either special delegation or subsequent ratification. The opinion merely states the propositions with the conclusions reached, and refers for a fuller discussion to the case of *Ringling* v. *Kohn*, 6 Mo. App. 332, where similar questions were presented, saying (p. 171):

"These positions are well supported by the numerous authorities cited and relied on by the Court of Appeals in its well-considered opinion in said case, and we think state the law correctly, when applied to the facts in this case, as well as to that."

The facts in the latter case were in brief as follows: The cashier of the People's Savings Institution, a corporation having general banking powers, borrowed from Kohn money in its name upon its demand note signed by him as cashier, pledging as security government bonds belonging to Ringling which the bank held on special deposit; the cashier then absconded, being a defaulter in an amount much larger than the loan. The suit was by Ringling against the pledgee to recover his bonds. On the first trial Ringling recovered judgment, which was reversed upon grounds not material to the present discussion, 4 Mo. App. 59. On the second trial Ringling again recovered judgment, the Court below holding that the act of the cashier in borrowing the money did not bind the bank without proof of special delegation or subsequent ratification. In reviewing this judgment the Court of Appeals, after affirming the power of the bank to borrow money as being "a necessary and inherent privilege, inseparable from the exercise of its banking

functions," and referring with approval to the decisions in *City Bank* v. *Perkins*, 4 Bosworth, 420, and *Barnes* v. *Ontario Bank*, 19 N. Y. 56, cited above, sustains the conclusions there reached, and sums up the matter in the following words:

"We find no judicial authority for the proposition that when a cashier borrows for his bank, the lender will be imperiled unless a special power has been given."

The opinion of the Supreme Court of Pennsylvania in the case of *First National Bank* v. *Sullivan*, 11 Weekly Notes of Cases, 362, is so terse and so much to the point that we quote it in full:

"We have no doubt of the power of national banks to borrow money by means of negotiable paper, made or indorsed for their accommodation, and that they are bound by the contract of their presidents or cashiers to indemnify the person who may have accommodated them with his credit. It is a usual banking operation, and unless expressly prohibited, would be necessarily implied in every bank charter."

In *Farmers' National Bank* v. *Sutton Manufacturing Co.*, 6 U. S. App. 312, the Court (Mr. Justice Brown and Circuit Judge Taft), in speaking of the question whether the Manufacturing Co. could avoid its acceptance in the hands of a *bona fide* purchaser for value before maturity on the ground that it was *ultra vires*, said (pp. 332–3):

"If the extrinsic fact upon which depends the lawful character of the act is one peculiarly within the knowledge of the general agent of the corporation by whom the act is done, the act itself is an implied representation that the necessary fact exists, the truth of which the corporation is estopped from denying against any person who in dealing with the corporation has parted with value on the faith of

it. The principle has been frequently applied in cases of commercial paper issued in the name of a corporation by its officers having general authority to issue such paper. A leading case is that of *Stoney* v. *American Life Insurance Company*, 11 Paige, 635. Chancellor Walworth there decided that a negotiable security of a corporation, which upon its face appeared to have been duly issued by the corporation and in conformity with the provisions of its charter, is valid in the hands of a *bona fide* holder thereof without notice, although such security was in fact issued for a purpose and at a place not authorized by the charter of the Company, and in violation of the laws of the state where it was actually issued.—See, also, to the same effect, *Farmers' & Mechanics' Bank of Kent County, Maryland*, v. *Butchers' & Drovers' Bank*, 16 N. Y. 125; *Bissell* v. *Michigan Southern and Northern Indiana Railroad Companies*, 22 N. Y. 258, 289; *The Mechanics' Banking Association* v. *New York & Saugerties White Lead Company*, 35 N. Y. 505; *National Bank of Republic* v. *Young*, 41 N. J. Eq. 531; *Wright* v. *The Pipe Line Co.*, 101 Pa. St. 204; *The Hackensack Water Company, Reorganized*, v. *DeKay*, 36 N. J. Eq. 548; *The Credit Company, Limited*, v. *The Howe Machine Co.*, 54 Conn. 357; *Gelpcke* v. *The City of Dubuque*, 1 Wall. 175–203; *The Genesee County Savings Bank* v. *Michigan Barge Co.*, 52 Mich. 438; *Bird* v. *Daggett*, 97 Mass. 494."

In connection with the last of these cases see *Monument Bank* v. *Globe Works*, 101 Mass. 57.

Pertinent observations with reference to the matter under discussion are found also in the opinion of the Court of Errors and Appeals of New Jersey in *The Hackensack Water Company, Reorganized*, v. *DeKay*, 36 N. J. Eq. 548, one of the cases mentioned in the list just quoted. Speaking with reference to the obligations of a corporation, the Court say (p. 563, *italics* ours):

"Persons taking securities of this character are chargeable with the knowledge of the power to make them as con-

ferred by the Charter. If the power granted by the Charter is subject to a condition relating either to the *form* in which the security shall be made in order to be valid, or to some preliminary proceeding, *extraneous to the acts* of the corporation or its officers, securities issued not in the prescribed form, or without the preliminary proceedings had, are subject to defenses in consequence thereof, even in the hands of *bona fide* holders."

The Court illustrates this by the case of a statute requiring as a preliminary to the issuing of bonds by a county, town or other corporation, that the assent of a certain proportion of voters or tax payers shall first be obtained; and then observes:

"But this doctrine does not prevail in those instances in which the right to issue such securities is by the Charter *conditioned upon the performance of acts by the corporation or officers relating to the management of the affairs of the company.*"

The Court then proceeds to cite the various English and American cases, and states they all support the proposition that (p. 564):

"Persons dealing with such companies are, as was said by Lord Hatherly, affected with notice of all that is contained in the statute and the articles of association; but with regard to all that the directors do with reference to what he calls 'the indoor management of their concern,' that is a thing known to them and to them only, and persons dealing externally with those managing the affairs of the company in a manner which appears to be perfectly consonant with the articles of association, *are not to be affected by any irregularities* which take place in the internal management of the company."

The application of this reasonable and well sustained doctrine is manifest. There is not in the national bank legislation any *express* power to borrow money. But the

associations have full *banking* powers. At common law and by constant and universal custom such power embraced the faculty of borrowing. This Court admits the power in the *Western National Bank* case. But it is suggested in that case that there ought to have been an order or authority by the directors. Let it be granted: yet under the authorities, *the lender has the right to presume that this was done.* Further than this: if the Act of Congress had said that the bank *may* borrow, upon such authority or direction; or even that it *shall not* borrow without it, the cases hold that when its officers *do* borrow, in the name of the bank, the lender may presume the authority of the directors.

Without further comment we refer to the following decisions additional to these, and those already cited under other heads, as confirming the propositions heretofore made:

Smith v. *Hull Glass Co.*, 11 C. B. 897.

Greaves v. *Legg*, 2 H. & N. 210.

Mahony v. *E. Holyford Mining Co.*, L. R. 7 H. L. 869.

County of Gloucester Bank v. *Rudry Merthyr, etc., Colliery Co.*, [1895] 1 Ch. 629.

Barwick v. *English Joint Stock Bank*, L. R. 2 Exch. 259, 266.

Swire v. *Francis*, L. R. 3 App. Cas. 106.

Montaignac v. *Shitta*, L. R. 15 App. Cas. 357.

In re Hampshire Land Co., [1896] 2 Ch. 743.

Creswell v. *Lanahan*, 101 U. S. 347.

Hanson v. *Head* (Sup. Ct. N. H.), 38 Atl. 788.

First Nat. Bank of Birmingham v. *First Nat. Bank of Newport* (Sup. Ct. Ala.), 22 South. 976.

Miller v. *American Mutual Accident Ins. Co.*, 92 Tenn. 167; 20 L. R. A. 765.

And we submit that, so far as the Chemical Bank is

concerned, the authority to borrow the money must be presumed.

V. RATIFICATION ESTABLISHED.

Thus far we have urged that the decree should be affirmed because the Chemical Bank was entitled to presume the loan was authorized. But we need not rest upon that ground solely; for the facts of the case establish ratification, both by the Fidelity National Bank before its dissolution, and by its receiver and creditors since.

Ratification is conduct of a person or his privies estopping him or them from asserting that a contract made or act done in his name was unauthorized. Ordinarily here, as elsewhere in the law of estoppel, the estopping conduct must have been done with knowledge of all material circumstances. But knowledge in this connection means not what one does know, but what he should know, that of which he has notice; and notice means information which should prompt to inquiry. If such information be given, the party receiving it is conclusively presumed to have all the knowledge which inquiry would have disclosed.

Speaking with extreme exactness, a corporation can have neither knowledge nor notice; for while in theory a juridical person, in truth it is but an imaginary being. It has no physical existence, and physical or psychical acts or powers can be attributed to it only by figure of speech. It neither sees, hears, nor feels of itself, but only through the senses of others—its agents. In every thing it acts by agents; the knowledge of its agents is its knowledge, and notice to them is notice to it.

THE LOAN WAS RATIFIED BY THE FIDELITY NATIONAL BANK BEFORE DISSOLUTION.

We might safely rest the claim that the Fidelity National Bank had notice of the loan that was made to it by

the Chemical National Bank upon the letter of March 2, 1887, which the cashier of the latter bank wrote to Baldwin, the cashier of the Fidelity Bank, advising him that the loan had been credited upon the books of the Chemical Bank (Rec., p. 33). Of course it will be urged by our opponents that Harper was attempting to defraud the Chemical Bank, and that Baldwin was his accomplice. The latter contention is only an inference; and if true is immaterial. For while it is now well settled that the general rule, that notice to the agent is notice to the principal, is subject to an exception in certain cases where the agent is himself perpetrating a fraud upon his principal (*American Surety Co.* v. *Pauly* [No. 1], 171 U. S. 133), yet this exception does not apply to those cases where the agent has been designated by the principal as the proper person to receive the very information with notice of which the principal is sought to be charged, so that the notice is received by the agent in the strict performance of his duty. To hold otherwise would overthrow the whole law of agency, and establish that loss by the fraud of an agent in the performance of his duty should fall upon the innocent third party, and not upon the principal who held the agent out as worthy of trust and confidence, and as the proper channel of communication to him. It was the Fidelity Bank that published to the world that letters sent to it upon matters of business should be addressed to Ammi Baldwin, its cashier; the Chemical Bank acted upon that invitation when it answered Harper's request by a letter to Baldwin; and the information thus given him was given to his principal, the Fidelity Bank.

There is no occasion for us to cite other authorities upon this proposition. Many are collected in the *Pauly* case. But the language of the Circuit Court of Appeals (Mr. Justice Jackson, and Judges Taft and Sage) in *First Na-*

tional Bank of Evansville v. *Fourth National Bank of Louisville*, 16 U. S. App. 1; 56 Fed. 967, is so pertinent that we can not refrain from quoting it. There a defaulting bookkeeper suppressed letters received, so as to hide his own irregularities. Nevertheless, his principal, the bank, was charged with knowledge of the contents of the letters thus suppressed. The Court, speaking through Sage, D. J., said:

"Here it was the business of Schor, the plaintiff's bookkeeper, to receive and open and distribute letters addressed to the bank and coming by mail. Hence the Court below rightly charged the jury that if they found that the letters mailed by the defendant were delivered to him, they should find that they were delivered to the bank. Now, it is claimed that because he secreted those letters, and kept them from the actual knowledge of the bank, the bank is not chargeable with notice of their receipt or of their contents, because he had no right to secrete them, and to keep them. As well might it be claimed that the bank could repudiate a payment made to its collecting agent by its debtor, because he had embezzled it, instead of paying it over. Schor's authority was to receive the letters for the bank, and the collector's agency, in the case put, was to receive money for the bank. Delivery in the one case was delivery to the bank, and payment in the other case was payment to the bank, and what Schor or the collector afterward did concerned only themselves and the bank, so far as the rights and interests of the parties were involved."

But again it is not necessary for us to stop here. Knowledge is carried to the bank and its responsible officers without being filtered through either Harper or Baldwin.

As stated heretofore, the practice between the two banks was for the Chemical Bank to render monthly accounts current to the Fidelity Bank, which would be checked over by the latter bank, compared with its books, and dis-

crepancies or other items calling for remark inquired about. So far as the Fidelity Bank was concerned, this matter was in the charge of its general bookkeeper, J. Harry Watters. The Chemical Bank furnished its account current for the transactions of March, 1887, early in April of that year; this was offered in evidence, Watters Exhibit No. 10, and will be found at the end of the record as now printed. The fourth item on the credit side of that account, under date of March 2, shows the loan here in question in the following words, "Tem. Loan, $300,000." On his examination, prior to the first appeal, Watters said (QQ. 48–49, Rec., p. 47) that this "account current was received by the Fidelity National Bank, and turned over to me about the 4th or 5th of April. It was checked up with the books of the Fidelity National Bank, and found to be O. K." And he then "filed it away among the papers of the Fidelity National Bank."

Being recalled after that reversal and examined somewhat with reference to this account, he endeavors to justify his action in filing this account away without further inquiry or report; but his attempted justification simply confirms the proof of his carelessness; it all comes to the point that if the entry had been different from what it was it would have meant something else—a proposition which no one will dispute. He is, indeed, but quibbling upon words; for it will be seen that by the word "entry" he is speaking only of the date and the amount, and where he uses the word "explanation" he means the explaining remark—in this instance the words "Tem. Loan." But when he is pinned down to the idea expressed by *this entry with this explanation*, to use his own terms, his answer is plain and unequivocal; see Rec., p. 235:

"Q. 45. Well, Mr. Watters, when it appears on the account rendered by the Chemical National Bank to the

Fidelity National Bank as a 'Tem. Loan' does not that signify necessarily a temporary loan from the Chemical National Bank to the Fidelity National Bank? A. Yes, sir."

"Q. 50. But as it stands it signifies a loan by the Chemical Bank to the Fidelity National Bank and nothing else, does it not? A. Yes, sir."

There can be not the slightest room for doubt, therefore, but that notice of this loan from the Chemical Bank was received by Watters, the general bookkeeper of the Fidelity Bank early in April, 1887, while he was acting in the performance of his duties as an agent of that bank. And, furthermore, as he made the false entries of March 2, dictated by Harper, he had all the threads in his hand, and knew, or should have known, the whole fraud.

The notice thus given to Watters, the general bookkeeper, was notice to all his superiors, including the board of directors, was notice to the bank.—We have already stated briefly the rule that notice to the agent of a corporation is notice to that corporation, and the reason for it. The only question here is whether Watters was the agent of the corporation. His position is stated by himself. He was general bookkeeper and general utility clerk (Rec., p. 72, Q. 2); it was his duty to examine these monthly accounts and to supervise the correspondence resulting therefrom. (Rec., pp. 224–225; QQ. 1–5; pp. 228–233, XQQ. 2–38.) He was, therefore, the agent specially designated by the Fidelity Bank, to receive information coming in the form of an account current, and to transmit the same, where necessary, to others. If he failed in performing his duty, or was negligent regarding it, that is the misfortune and loss of the bank, his principal, whose business he was doing, not of its customer who corresponded with the bank in the regular way.

The Chemical Bank was not dealing with J. Harry Watters in the matter of these accounts. Its dealings were with the Fidelity Bank. To the Fidelity Bank it transmitted the account, which showed that it had made a loan to the Fidelity Bank on March 2, 1887, of $300,000, and that without this loan the account of the Fidelity Bank with it for that month would have been overdrawn on March 28th by $296,000, and on April 1st by $332,000. This account the Fidelity Bank turned over to Watters to investigate. Whatever he learned or should have learned by such investigation, his principal, the Fidelity Bank, as a matter of law knew; and the board of directors of that bank, if they be considered its active managing body, are chargeable with, and can not escape the responsibility of, the same knowledge. No remissness, or negligence, or even fraud of Watters in performing his duty will shield them, so far as the Chemical Bank is concerned. When once it is established, as this record does establish, that the entry which we have quoted is but a short form of stating that on March 2, 1887, the Chemical National Bank loaned to the Fidelity National Bank the sum of $300,000, the proved reception of that account at the Fidelity Bank carries with it knowledge to that bank and all its officials, that such a loan was made.

This Court has previously had occasion to pass upon questions which are identical in principle with that at bar upon this point. We have already quoted a passage from *Martin* v. *Webb*, 110 U. S. 7, which is in point (*supra*, p. 113). The subject was also considered in *Kissam* v. *Anderson*, 145 U. S. 435. There it appeared that Warner, the cashier of the Albion Bank, was engaged in stock speculations upon his own account in New York, through Kissam, Whitney & Co., brokers of that city. In the course of those speculations he sent to Kissam, Whitney & Co.

drafts of his own bank, signed by him as cashier, to their order on the Third National Bank of New York for the aggregate amount of $103,000. The proceeds of these were applied to his stock account; and upon the other hand, Kissam, Whitney & Co. at sundry times returned to the Third National Bank sums aggregating over $[illegible], which were entered by that bank to the credit of the Albion Bank, and notice thereof was sent, in the regular course of business, by the former to the latter bank. Of these, however, only $25,850 were charged to the Third National Bank upon the books of the Albion Bank. The Albion Bank having failed and gone into the hands of a receiver, he brought suit against Kissam, Whitney & Co. for the amount of the drafts which had been sent to them by Warner; and the Court below had held that the defendants were not entitled to credit for the moneys they had deposited in the Third National Bank to the credit of the Albion Bank. This Court held that this was error, and with reference to the particular point which we are now discussing, speaking through Mr. Justice Brewer, said, (p. [illegible] 442):

"If it be said that no officer of the Albion Bank knew of these deposits except Warner, the wrongdoer, and that he subsequently drew out most of these moneys in drafts to further other wrongs, the reply is, that the other officers and directors of the Albion Bank were chargeable with knowledge of these deposits. If, through their negligence, they did not in fact know, that is a matter for which the Albion Bank, and not the defendants, were responsible. Kissam, Whitney & Co. had no supervision over its affairs, no knowledge as to how those affairs were managed. They were not called upon to go to Albion and hunt up the various officers and directors, and inform them, one by one, personally, that these moneys had been deposited to their credit in the Third National Bank. It was enough

that they deposited them, and that that bank, in the regular course of business, by monthly statements, informed the Albion Bank that it received and held those moneys."

In *Knights of Pythias* v. *Kalinski*, 163 U. S. 289, speaking as to the effect of reception of assessments by a benevolent order from a member after delinquency upon his part sufficient to forfeit his membership, this Court, speaking through Mr. Justice Brown, said (page 298):

"Granting that the continued receipt of premiums or assessments after a forfeiture has occurred will only be construed as a waiver, when the facts constituting a forfeiture are known to the company, *Insurance Co.* v. *Wolff*, 95 U. S. 326; *Bennecke* v. *Insurance Co.*, 105 U. S. 355, this is true only of such facts as are peculiarly within the knowledge of the assured. If the company ought to have known of the facts, or with proper attention to its own business, would have been apprised of them, it has no right to set up its ignorance as an excuse. In the ordinary course of business between the lodges and the sections of the endowment rank, and under the instructions contained in the circular of the Supreme Chancellor of May 20, 1887, it became the duty of the keeper of the records and seal of the lodge to which Kalinski belonged to notify the secretary of the proper section of the endowment rank of the fact that he was in arrears for dues, and his failure to do this should be imputed to the defendant, as representing the order, rather than to Kalinski."

In *Marsh* v. *Keating*, hereafter to be mentioned more specifically in another connection (*infra*, p. [illegible]), Park, J. delivering the opinion of all the judges to the House of Lords, who adopted that opinion, speaking of the liability of a firm of bankers for money credited to their account with another bank, and shown by entry upon their passbook with that bank, though not upon their own books be-

cause of frauds of one of their partners, said, 2 C. & F. 250, 289 (also reported in 1 Bing., N. C. 198, and 1 Scott, 5) :

"But it is urged, that the present defendants had no knowledge that the money was the property of the plaintiff, being perfectly ignorant, as the special verdict finds, of the commission of the forgery, of the sale of the stock, or the payment of the produce of such sale, into their account at Martin & Co.'s.

"It must be admitted that they were so far imposed upon by the acts of their partner, as to be ignorant that the sum above mentioned was the produce of the plaintiff's stock; but it is equally clear that the defendants might have discovered the payment of the money and the source from which it was derived, if they had used the ordinary diligence of men of business.

"If they had not the actual knowledge, they had all the means of knowledge; and there is no principle of law upon which they can succeed in protecting themselves from responsibility, in a case wherein, if actual knowledge was necessary, they might have acquired it by using the ordinary diligence which their calling requires."

Having knowledge, the omission to repudiate the loan was a ratification of it.—What occurred after the account was received has been stated in the statement of facts. (*Supra*, pp. 15–19). It was the custom, as stated, for the Fidelity Bank to write, asking explanations of matters set forth in the account which were not recognized as correct; and the explanation was written upon the same sheet containing the request and returned. Whether any explanation at all was asked early in April with reference to this account for March, as was the custom, is not proved. If such explanation had been requested, it, with the answer to it, should have been found on the files of the Fidelity Bank. It was not there, although explanations for the subsequent months were found and produced, and offered in evidence. Some

items of the account for March were unquestionably the subject of explanation, for the letter of the Chemical Bank of May 11, 1887, answers inquiries made with reference to them (Rec., p. 269). This much, however, can be affirmed as indisputable, that no question or comment was ever made as to the loan of March 2. So far as the Chemical Bank was concerned, that loan was permitted to stand as an accepted and established fact. In faith of that loan it paid checks of the Fidelity Bank against it; it gave up, in April, $10,000 of the security transmitted with the request for the loan; it permitted the substitution of other securities in May, 1887; it made large advances in June, 1887; and by June 20, when the Fidelity Bank suspended payment, it had allowed it to overdraw, after crediting it with this loan of March and with the loan of $200,000 in June, to the extent of $89,000. (Armstrong Exhibit 6, Rec., p. 105.) Surely this is acquiescence on the part of the ~~Chemical~~ Bank, and much more. The loan was made; the money was credited to the account of the Fidelity Bank; knowledge of the loan is conclusively presumed; the money loaned was actually used and applied to the credit of obligations of the Fidelity Bank, which are admitted in this record to have been valid—for this application of the checks paid from the loan is set forth in the March account, Watters Exhibit 10, exhausting the whole amount of the loan, and Watters says that the account was checked up with the books of the Fidelity National Bank, and found to be O. K., which proves that all of these checks were regularly issued; and furthermore, the reconcilement sheet of this account (Rec., pp. 259, 260) shows that the checks drawn by the Fidelity Bank had been compared with the checks paid by the Chemical Bank, and those drawn but not presented noted (Rec., p. 159, McCauslen, QQ. 28, 29); and the reconcilement sheets for April and

May (Rec., pp. 261, 264) show that while there had been a discrepancy of $50.50 in the February account, there was none in the subsequent ones. Hence there is proved beyond dispute not only a loan and knowledge of the loan, but actual use of the money loaned. That facts such as these establish ratification can not be questioned. We have already (*supra*, p. 139) called attention to *Kissam* v. *Anderson*, 145 U. S. 435, which is so closely analogous as to be authoritative, were it the only decision upon the subject. But the point presented is identical with that decided by this Court in *Leather Manufacturers' Bank* v. *Morgan*, 117 U. S. 96. The question there presented was as to the right of a depositor to surcharge and falsify an account rendered him by his bank after he had retained it without objection longer than was reasonably necessary for its examination. It appeared that the errors claimed by him had been caused by checks raised and cashed by one of his clerks, and that the auditing of the account on its return had been entrusted to the same clerk, who, naturally, had not advised his employer of the state of affairs. The conclusion reached by the Court is accurately stated in the syllabus as follows:

"A depositor in a bank, who sends his pass book to be written up, and receives it back with entries of credits and debits, and his paid checks as vouchers for the latter, is bound personally or by an authorized agent, and with due diligence, to examine the pass book and vouchers, and to report to the bank, without unreasonable delay, any errors which may be discovered in them; and if he fails to do so, and the bank is thereby misled to its prejudice, he can not afterward dispute the correctness of the balance shown by the pass book."

The ethics as well as the law of the matter are summed up by the Court in the following sentence (p. 112):

"Where a duty is cast upon a person, by the usages of business or otherwise, to disclose the truth—which he has means, by ordinary diligence, of ascertaining—and he neglects or omits to discharge that duty, whereby another is misled in the very transaction to which the duty relates, he will not be permitted, to the injury of the one misled, to question the construction naturally placed by the latter upon his conduct."

Previously, the case of *Burton* v. *Burley*, 9 Biss. 253; 13 Fed. 811, had been decided by Judge Drummond. The syllabus, which sufficiently shows the applicability of the decision, is:

"Where the president of National Bank A. instructed its correspondent, Bank B., to charge up against the former bank the amount of a private note which the latter bank held against him, in payment of said note, and this was done, and account rendered showing the transaction, which was accepted by the first bank; *Held*, that Bank A. was estopped from denying the correctness of the charge, and that a receiver subsequently appointed could not set aside the transaction."

Still earlier in *Gold Mining Co.* v. *National Bank*, 96 U. S. 640, 644, this Court had said:

"The judge's charge on the subject of the ratification by the company of the acts of Sabin contained all that it was necessary to say to the jury. It was, in substance, that if Sabin was the agent of the company in working its mines in Colorado in 1867 and 1868, without authority to borrow money in its name, but did in fact borrow large sums of the plaintiff in its name, if, on the 16th of December, 1868, the president of the company was informed of such borrowing and of the amounts, and a demand was made for the payment thereof, and if within a reasonable time thereafter the company failed to disavow the acts of its agent in so borrowing the money, the jury would be authorized to

consider the company as assenting to what was done in its name. We consider this charge entirely correct."

And in *Insurance Co.* v. *McCain*, 96 U. S. 84, where it appeared that the assured had paid a premium upon his policy to a former agent of the Insurance Company without notice that his agency had ceased, and that four months afterwards this ex-agent had rendered a statement to the company showing the payment, after which the company kept silent while the assured lived, this Court said:

"The law on the silence of the company, after receiving the statement of the agent that the premium had been paid, is also free from doubt. Silence then was equivalent to an adoption of the act of the agent, and closed the mouth of the company ever afterwards."

While it is thus manifest that it is not necessary to go beyond the decisions of this Court for conclusive authority upon the exact question presented, it is not inappropriate to refer the Court to cases elsewhere supporting the same conclusion. The Court will already have observed, when reading the cases which we have cited as to the presumption of authority to make the loan, that many of them establish the sufficiency of the ratification here shown. In addition to those, we beg leave also to refer to the following:

Ogilvie v. *West Australian Mortgage and Agency Corporation, Limited*, [1896] App. Cas. 257.

Mundorff v. *Wickersham*, 63 Pa. St. 87.

Pope v. *Armsby Co.*, 111 Cal. 159.

Busch v. *Wilcox*, 82 Mich. 315.

Hawkins v. *Fourth National Bank*, 150 Ind. 117.

Morse v. *Ryan*, 26 Wis. 357.

Thomas v. *City Bank of Hastings*, 40 Neb. 501.

Tradesmens' National Bank v. *Bank of Commerce* (N. Y. Sup. Ct.), 6 App. Div. 358.

Bank of Lakin v. *Nat. Bank of Commerce*, 57 Kan. 183.

St. Paul and Minneapolis Trust Co., v. *Howells*, 59 Minn. 295.

International Trust Co., v. *Norwich Union Fire Ins. Soc.*, 36 U. S. App. 277; 71 Fed. 81.

American National Bank v. *National Wall Paper Co.* 40 U. S. App. 646; 77 Fed. 85.

Ditley v. *Dominion Nat. Bank*, 43 U. S. App. 613; 75 Fed. 769.

Am. Exch. Nat. Bank v. *First Nat. Bank*, 48 U. S. App. 633; 82 Fed. 961.

THE RECEIVER AND CREDITORS OF THE FIDELITY NATIONAL BANK OBTAINED ACTUAL KNOWLEDGE OF THE FACTS, AND RATIFIED, BOTH BY SILENCE AS REGARDS THE CHEMICAL NATIONAL BANK, AND BY PROSECUTING THE DIRECTORS AND RECOVERING FROM THEM FOR NEGLIGENCE IN THIS TRANSACTION.

The Court will remember the facts: that notice of the loan was given to Armstrong, the receiver of the Fidelity National Bank, as early as July 6, 1887, if not previously (see letter of that date, Rec., p. 268); that the application to this loan of the collaterals forwarded in June led to a dispute between Armstrong and the Chemical Bank in November, 1887, in which the existence of the loan was not disputed, but merely the right to apply those collaterals toward its payment (Armstrong's letter of November 14, 1887, Rec., p. 24); that this dispute resulted in a suit brought in New York by the appellant, in which the right of the Chemical Bank so to apply the June collaterals was denied, but the existence of the loan as an indebtedness was not challenged; that previously, on September 18, 1887, the receiver had brought suit against the directors of the Fidelity Bank to recover damages for neglect of

their duties, counting, among other things, upon their permitting an embezzlement by Harper during the period covering the time of this loan of more than the sum lent, and suffering the issue of false obligations (Rec., p. 271); that during the progress of this suit, J. Harry Watters was called to the stand, and on January 19, 1889, testified fully as to the transaction here in question (Rec., pp. 206–222); that upon that bill and that testimony, the receiver, under remonstrance of only three of the creditors and stockholders, though all were notified, took a decree on April 16, 1890, against some of the directors for $450,000 (Rec., p. 289), which decree has been satisfied: that all this was done prior to the filing of the bill in this cause; that the claim upon which the bill in this case was founded was filed with the receiver shortly before the rendition of that decree, and was rejected May 2, 1890, with a letter which did not deny, but inferentially admitted, the validity of the claim (Rec., pp. 101–103); and that the original answer filed in this cause also in legal effect admitted the validity of the claim (Rec., p. 8).

These facts, we submit, are sufficient in themselves to establish a ratification by the receiver and the creditors and stockholders of the Fidelity Bank, acting on their own behalf, since its dissolution. There was no possible theory upon which the receiver and creditors could recover against the directors for any thing done by Harper in this transaction, unless Harper in what he did was the agent of the Fidelity Bank. If he was not such agent, then his acts had in no way harmed those creditors and stockholders; and there could be no negligence of the directors in that connection, nor liability by them to the bank or those interested in it. The very assertion of such liability on the part of the directors was necessarily and unavoidably an assertion that

Harper was an agent of the Fidelity Bank in the transaction. And if his agency had theretofore been disputed in law, it could not be so thereafter; for all the facts were then known, and proceeding upon the theory that he was an agent was a ratification. The receiver and creditors had come to the parting of the ways; they made their election and they must abide by it. It would be a strange thing indeed if a principal could recover from a head-agent for permitting a sub-agent to transcend his powers, or from a surety for his agent upon the theory that the agent had been delinquent, and thereafter repudiate as unauthorized the very transaction because of which his recovery against the head-agent or surety was obtained. Yet these are the very propositions which must be established to defeat this claim of ratification.

The charter of the Fidelity Bank had been forfeited and the corporation dissolved on July 12, 1887, as is admitted in the pleadings (Rec., pp. 5, 17); thereafter the only representative of the corporation was the receiver. His action and his knowledge from that time is the action and knowledge of the corporation and of all interested in it; so that ordinarily it would not be necessary to look beyond him. But when we see, as we do here, that he had brought this suit to enforce the liability of the directors, and had prosecuted it under the guidance of learned counsel, and—his evidence having been completed—had then received an offer of compromise, which he submitted to the Comptroller of the Currency, by whom he was directed to lay the matter before the Court; and when we see further that on such petition to the Court, and the statement that a number of the largest creditors recommended it, the Court directed notice to be given to all claimants upon the fund, and, after hearing, ordered the compromise to be made, there being practically no re-

sistance, it is obvious that in this matter the receiver had the support and indorsement of every person who had a voice upon the subject. Nor does it alter or diminish the significance to be given to the transaction that other claims were alleged against the directors besides this. It is sufficient that *this claim* was alleged and proved and compromised. After such settlement had been made how could the Chemical National Bank maintain any action against Harper because of this transaction—aside, of course, from his indorsement upon the certificate of deposit? He did not deal with it as a principal, but only as an agent. He could be held responsible only for misrepresenting that he was an agent. And if suit were brought against him upon this theory, what response could the Chemical Bank make, when he in defense said: My principal adopted the agency and made my associates pay for permitting it?

It was long ago settled that where an agent entered into an unauthorized contract with a third party, the principal ratified that contract by collecting its proceeds or their equivalent either from the third party or from the agent. *Billon* v. *Hyde*, 1 Atk. 126; *Wilson* v. *Poulter*, 2 Strange, 859; *Vernon* v. *Hanson*, 2 Term. 287; *Cushman* v. *Loker*, 2 Mass. 106. And therefore over one hundred years ago this Court declared that where the United States sued its agent for issuing a false certificate of indebtedness, they thereby estopped themselves from denying the validity of the certificate. *Fenemore* v. *United States*, 3 Dall. 357. There has been no change in the law since that time. *Central Trust Co.* v. *Ashville Land Co.*, 43 U. S. App. 1; 72 Fed. 361; *The Farmers' & Merchants' Bank of Elk Creek* v. *Farmers' & Merchants' National Bank of Auburn*, 49 Neb. 379. So here, by holding Harper and his associates to account for the making of this loan, and not merely for the dam-

ages which had ensued to the Fidelity Bank by its making,—for no damages had ensued if the Fidelity Bank was not responsible upon the loan,—the receiver, creditors, and stockholders of the Fidelity Bank ratified the loan with just the same consequences as if the directors had authorized it in the first instance.

VI. AS THE MONEY LOANED ACTUALLY WENT TO THE BENEFIT OF THE FIDELITY NATIONAL BANK, IT IS LIABLE THEREFOR EVEN IF THE LOAN WERE UNAUTHORIZED.

The Court will remember that the proceeds of the loan were credited to the account of the Fidelity Bank with the Chemical Bank, and were checked out of that account by its authorized checks, and so went to pay its valid liabilities. Every dollar borrowed went to the use of the Fidelity Bank; and if the loan had not been credited, the same checks having been presented, the Fidelity Bank would have been indebted to the Chemical Bank in the same amount by way of over-draft. No dispute or controversy can arise upon the record with reference to these facts; the only question is whether their legal effect is in any way altered by the fact that on the same day upon which the loan was credited in New York, Harper took credit in Cincinnati for the same amount. The Chemical Bank was in absolute ignorance of what Harper had done in Cincinnati, and never had means of knowledge until the facts were developed in the litigation after the Fidelity Bank failed. This was not true as to the latter bank and its directors; for what he had done in Cincinnati was shown by their own books and papers; and furthermore, knowledge of what he had done in New York was actually given to Baldwin, the cashier, and to Watters, the bookkeeper, and

the information given to the latter remained on file always accessible.

To refuse relief because of Harper's embezzlement would be to relieve those guilty, and to punish those innocent, of negligence. Indeed, not only was there negligence with regard to the account forwarded by the Chemical Bank, but in the making of the entries whereby Harper received credit at Cincinnati for $300,000. These were made simply upon his verbal instructions, without the production of a scrap of paper to warrant them. It is, of course, a very usual thing for funds to be transferred and credits to be given by book entries; but such transactions should be made only upon letters of advice. And it is a most remarkable thing that such a thing should be done on the order merely of him who receives the credit. It may be the duty of a clerk, from a banker's point of view, to make every entry which his superior directs him to make; in other words, he may be a mere machine. But we should very much dislike to be upon the bond of a clerk who took that view of his duties.

Assuming, however, that in the interests of due subordination it is proper for a clerk to make entries directed by his superior in the interest of that superior, and without proof other than his word, it certainly is further his duty to report what he has done to some other superior. The proposition is, we think, self-evident. Counsel for the appellant undertook to examine some of the bankers who were called to the stand with reference to this matter of transfer of funds, and to show by them that it was a common thing for a person to take credit at a bank in Cincinnati in return for a credit given to that bank in New York; and in that way to show that the Cincinnati part of Harper's transaction was not extraordinary. While they actually said that the clerk's business was to do what he was told,

yet they further said that it was extraordinary to direct the making of such an entry without producing a letter of advice authorizing the credit; and so far as they were examined by us (for we did not think it necessary to question them all upon so evident a proposition), said further that the clerk who had made such an entry in favor of his superior upon his word only, should at once inform some other superior, and should keep his eye upon the account current next sent by the corresponding bank where the counter credit was alleged to have been given. See the testimony of M. M. White, Rec., pp. 169–172; W. S. Rowe, Rec., pp. 189–191; H. C. Yergason, Rec., pp. 194, 195; G. P. Griffith, Rec., pp. 198–200.

But it matters not what Harper did at Cincinnati. His transactions there are not and can not be connected with the transactions in New York. With the former the Chemical Bank was in no way connected. At the time he made the transfer of funds in Cincinnati, he had no knowledge that the loan had been or would be made; if he trusted to its making, this was pure trust and assumption upon his part; for the only advice given of it was by the letter mailed on March 2, which could not reach the Fidelity Bank before March 4. A little appearance of connection and complication results from the form in which Harper put, and no doubt purposely put, his proceeding; for by labeling his transaction at Cincinnati a transfer of funds, he suggests to the mind the idea that there was in fact such a transfer, and therefore an identity of the funds, *i. e.*, that the money which he had credited to his account in Cincinnati was the identical money which the Chemical Bank lent to the Fidelity Bank in New York. But this is not true. Although Harper had a magician's power over his colleagues in the directory of the Fidelity Bank, he was not otherwise a master of

sorcery. By his mere *ipse dixit* he could not transfer money from the vaults of the Chemical Bank in New York to those of the Fidelity Bank in Cincinnati. The money which the Chemical Bank lent to the Fidelity Bank never left New York except as it was drawn from the Chemical Bank upon the checks of the Fidelity Bank. Indeed no money, as a matter of fact, passed in the transaction. A credit was extended by the Chemical Bank to the Fidelity Bank, and nothing more. Harper took a counter credit at Cincinnati. But to the latter the Chemical Bank was no party, and of it that bank remained in ignorance. The two transactions are altogether separate and distinct.

A very simple test shows the truth of this. Suppose Harper had died immediately after taking the false credit in Cincinnati and while it remained unimpaired upon the books of the Fidelity Bank; and suppose that in other respects this transaction remained as it happened; that the Fidelity Bank had drawn upon the Chemical Bank and exhausted the credit of $300,000 which had there been given it. Could the Fidelity Bank have maintained for an instant that it was not liable for the return of that money so borrowed from the Chemical Bank? Evidently not. Having used the money, the Fidelity must repay it, and could not turn the Chemical Bank over upon Harper's estate, and this although Harper's estate still had a credit of $300,000 with the Fidelity Bank. The false credit which Harper took of itself entailed pecuniary damage upon no one. It was when he began to draw upon that credit that damage arose. When this occurred, if it occurred at all, there is no proof in this record. *Non constat*, for any thing that here appears, but that Harper's account with the Fidelity Bank showed a balance to his credit of over $300,000 until long after the account current of the Chemical Bank for March, 1887, was received. All we know upon

that subject is the statement of Watters (Rec., p. 83, Q. 106) that ultimately upon the failure of the bank in June, 1887, it was discovered that he had drawn out of his account upon his checks much more than $300,000. But when these checks were drawn, and what other deposits were made, are matters as to which we are in ignorance. We only know that the president of the bank was very well satisfied with the state of his account (Rec., p. 180, QQ. 16–18; p. 182, XQQ. 13–15).

Non constat again, for any thing that appears in this record, but that on February 28, 1887, when Baldwin issued the certificate of deposit in the name of Harper, the latter had over $300,000 to his credit, and that his account was then charged with this certificate of deposit. If so, and the burden is on the appellant to show that this was not so, that certificate was beyond question a valid obligation of the Fidelity Bank. The burden of disproving this fact is not sustained by evidence of entries on the stubs of the certificate book, throwing suspicion upon the certificate; for these might result from the carelessness of an entry clerk having charge of the certificate book; moreover, mere suspicion is not enough; the proof must go farther, and show that no consideration was in fact given for the certificate to avoid it as a valid obligation.

There could not be even a *claim* of right of action, or the slightest pretense upon which to base a demand, in favor of the Fidelity Bank against any one for substantial damages because of the entry Harper caused to be made upon its books, if that were a false entry, until he had taken advantage of it by drawing against it. Till that time, while the transaction would be criminal, it would be *injuria absque damno*. And when Harper did draw against that credit, the right of action would be only to

the extent to which he did draw, and would be against him, and not the Chemical Bank.

Thus the assumed identity and continuity between the loan made by the Chemical Bank and the actions of Harper at Cincinnati fail. As between the Chemical Bank and the Fidelity Bank, and by the action of the officers of the latter bank, it came into possession of the proceeds of that loan of $300,000 by the deposit to its credit in the Chemical Bank; and against these proceeds the Fidelity Bank drew by the authorized drafts and checks of its officers in the usual course of business until, before the month had expired, the credit had been exhausted. If that credit had not been given it must have furnished other moneys to meet those drafts and checks. To allow the defense now interposed to succeed would, as between the two banks, be to allow the Fidelity Bank to retain the $300,000 without any return to the Chemical Bank, upon the allegation of fact, wholly immaterial to the Chemical Bank, that an officer of the Fidelity Bank had swindled his own bank out of $300,000, and this without even furnishing direct and specific proof that such a swindle had taken place.

Inasmuch as the loan was not merely credited to the account of the Fidelity Bank, but was drawn by it *by duly authorized checks* in the regular course of business, the case differs widely from *Western National Bank* v. *Armstrong*, 152 U. S. 346; for there the credit was exhausted by false and fictitious checks not issued in due course of business. Here the money loaned became as much the property of the Fidelity Bank, and as much in its possession for all practical purposes, as if legal tender money had been mailed or expressed to it, and by it physically received and placed in its vaults. And its defense is no different in legal effect than would have been a defense to such a state of facts, that after the money was received Harper had,

through advantage of his position as a trusted official, abstracted and embezzled that or other money, either by taking it directly from the vaults by theft, or by doing the equivalent by over-drawing his account. It will place the whole banking business in a very anomalous and dangerous situation if it once gets into books of authority that a borrowing bank, which has had the benefit of a loan by its application to the extinguishment of an equivalent amount of its valid obligations, can succeed in defeating its liability for the loan because its own officers robbed it. And, with all deference, it is submitted that this is all there is in this branch of the case at bar.

We have referred already to *Marsh* v. *Keating*, 2 C. & F. 250 (*supra*, p. 141). It is a case that in many respects, and particularly with reference to the point we are now considering, is closely analogous, and is indeed stronger against the defrauded principal than the case at bar. It grew out of the noted Fauntleroy forgeries which created so much commotion in English banking circles in the early part of this century, and a very interesting account of which is contained in Lawson's *History of Banking*, a book to which we have already referred. The importance of the questions involved led the House of Lords to request the opinion of the judges. This, as we have stated, was given by Park, J.; and their unanimous opinion was concurred in and adopted by the House of Lords. While the statement of facts is quite voluminous, the following is a fair summary, and gives the gist of the matter.

Keating, the defendant in error, was the owner of registered government annuities transferable at the Bank of England; Marsh, Fauntleroy, and others were partners, doing a banking business under the name of Marsh & Company; Fauntleroy forged the signature of Keating to a power of attorney to transfer the annuities, under which they

were sold and transferred to Tarbutt on December 29, 1819, and the proceeds were deposited with Martin & Co., bankers, to the credit of the account of Marsh & Co.; the deposit was entered in the pass-book of Marsh & Co. as "Cash per Fauntleroy," his name denoting the person who made the deposit; this pass-book was the usual book, furnished by the bank but kept in the possession of the depositor, in which the bank enters deposits as made, and which it balances from time to time; while a book of the firm of Marsh & Co., Fauntleroy was usually permitted by them to keep it locked up in his own desk; a corresponding entry should, of course, have been made in the other books of Marsh & Co.—as these should have corresponded with the pass-book, —but was not; nor did this credit ever appear upon the other books of Marsh & Co.; all drafts upon the account of Marsh & Co. with Martin & Co. had to be signed in the firm name, but Fauntleroy paid into that account, and by such drafts drew out, large sums for his individual purposes; the account between Marsh & Co. and Martin & Co. was repeatedly balanced between December 29, 1819, and September 13, 1824, when Marsh & Co. became bankrupts, this and other forgeries of Fauntleroy having been discovered; in the meantime Fauntleroy had caused the books of Marsh & Co. to be so kept as to show a credit to Keating of dividends upon all her annuities, including those which had been sold as above mentioned, as the same became due; all of the partners of Marsh & Co., other than Fauntleroy, were ignorant of his frauds until after their bankruptcy. The suit was to establish the claim of Keating against the assets of Marsh & Co. for the proceeds of the sale made by Fauntleroy under the forged power of attorney as for money had and received, and was prosecuted in her name for the benefit of the Bank of England. The judges having been called in, their unanimous opinion was given by Park, J.; in this

opinion he disposes of the question which is of interest here in the following manner (2 C. & F. 288):

"But it is objected, thirdly, that the proceeds of the sale of stock never came into the hands of the defendants, so as to be money received by them to the use of the plaintiff; and the consideration of this objection involves two questions:—First, did the money actually come into the possession of the defendants? Secondly, if it ever was in their possession, had the defendants the means of knowledge, whilst it remained in their hands, that it was the money of the plaintiff, and not the money of Fauntleroy? As to the first point, the special verdict finds expressly that Simpson, the broker, paid the sum of 60,131*l.* 2*s.* 6*d.*, being the amount of the sum received from Tarbutt, (deducting one-half of the usual commission), by a check payable to Marsh and Co. into the hands of Martin and Co. to the account of Marsh and Co., at the precise time of such payment; therefore there can be no doubt but that it was as much money under their control as any other money paid in at Martin and Co.'s by any customer under ordinary circumstances. The house of Marsh and Co. might have drawn the whole of the balance into their own hands; if the same money had been paid into Martin and Co.'s as the produce of the plaintiff's stock, sold under a genuine power of attorney, it would unquestionably have been received by all the defendants to the use of the plaintiff. It would not the less be money received by the partners of the firm, because (as found in the special verdict) it was entered in the account as 'Cash per Fauntleroy,' or because it never appeared in the house-book, or any other books of Marsh and Co., but only in the pass-book of that firm with Martin and Co., or because it never came into the yearly balancing of the house of Marsh and Co., or in any other manner into their books. Those several circumstances prove no more than that Fauntleroy, one of the partners, deceived the others, by preventing the money from being ultimately brought to the account of the house; but as between them and the person by the sale of

whose stock it was produced, we think the fraud of their partner Fauntleroy, in the subsequent appropriation of the money, affords no answer after it has once been in their power; and that it was so, appears to be distinctly stated in the special verdict."

Then follows the passage quoted from the same case on p. 142, *supra*. Then, after disposing of another point, the opinion concludes:

"Upon the whole, therefore, we beg to state our opinion to be, that, upon the question which has been proposed to us by your lordships, A. has a right to recover the produce of her stock against the surviving partners of the firm, who received it under the circumstances stated in the special verdict in an action for money had and received to her use."

We submit that the reasoning in this case covers and goes beyond the case at bar. There Fauntleroy swelled the bank balance to the credit of his firm with the proceeds of another's property, embezzled the money, and successfully concealed his fraud until his firm went into bankruptcy—concealed it, however, through the neglect of his associates in not examining their bank pass-book, through which his proceedings might have been traced. Here, upon our opponents' contention, Harper did exactly the same thing, only in place of depositing money secured by selling the property of a customer of a firm, he deposited money borrowed in the firm name from a customer of the firm. The account current sent by the Chemical Bank answers in all respects to the pass-book entered up by Martin & Co. There was a deposit to the credit of the firm with which the rogue was connected, notice of that deposit, and embezzlement by the rogue. The only difference between the cases is one which should *a fortiori* cause the rule applied

there to be applied here, *i. e.*, that there the embezzlement was made by checking directly upon the account where the deposit was entered, while here the alleged embezzlement was made in an entirely different place, and without drawing upon the bank where that deposit was made.

The same question was before the Queen's Bench Division very recently in the case of *Reid* v. *Rigby & Co.*, [1894] 2 Q. B. 40. The facts were that Allport, the manager of the defendants, induced the plaintiff to cash a check drawn by Allport, in the defendants' name, upon their bank account, telling the plaintiff he needed the money to pay wages; the check was never presented for payment; about eighteen months afterward Allport died, and it was discovered that he had misappropriated large sums of defendants' money; the plaintiff then demanded payment, and being refused, brought suit. The county judge found that Allport had no authority to borrow, and that he made this transaction to raise money to replace other money of defendants which he had stolen. The Court of Queen's Bench adopted the facts as thus stated, and found, furthermore, that the money received of the plaintiff had been paid into the defendants' bank account, and thereupon rendered judgment in favor of Reid.

Mr. Justice Charles, in the course of his opinion, said:

"In this case the money actually came into the possession of the defendants. Further, it seems that the defendants have had the opportunity of finding out where it came from, and as soon as it is established, first, that the money is actually in their possession; secondly, that they had the means of knowledge that it was in their possession; and thirdly, that it had been actually applied to the purposes of the defendants, the money received must be regarded as received to the use of the plaintiff."

Substantially the same question was before this Court in the case of the *Merchants' Bank* v. *State Bank*, 10 Wall. 604, which has been already so frequently alluded to. And it came before the Court again in an outgrowth from that transaction in *United States* v. *State Bank*, 96 U. S. 30. While the litigation between these two banks was pending, they had both brought suit against the United States to recover upon certificates of deposit for the gold there in controversy, which had been issued from the sub-treasury at Boston through a fraudulent conspiracy of Mellen, Ward & Co. and Hartwell, the cashier of the sub-treasury. Hartwell had embezzled from the sub-treasury a large amount, and lent it to Mellen, Ward & Co.; anticipating an examination, the certificates referred to in the case in 10th Wallace were procured and deposited at the sub-treasury, so as to cover up his deficit. The United States attempted to maintain their hold upon the certificates because of the prior frauds of Hartwell, but failed. This Court, having sustained the title of the State Bank and its liability as between the two banks, further sustains its title as against the United States, and after alluding to the cases of *Atlantic Bank* v. *Merchants' Bank*, 10 Gray, 532, and *Skinner* v. *Merchants' Bank*, 4 Allen, 290, as being strikingly like the case before them, continued (p. 36):

"But surely it ought to require neither argument nor authority to support the proposition, that, where the money or property of an innocent person has gone into the coffers of the nation by means of a fraud to which its agent was a party, such money or property can not be held by the United States against the claim of the wronged and injured party."

The only differences that can be suggested between this case and the one at bar are first, that there the em-

bezzlement preceded the deposit; and secondly, there the embezzlement and deposit occurred at the same place, while here they did not. These, however, are distinctions without a difference. The transfer of funds, which was the first step in the alleged embezzlement, here preceded knowledge of the deposit; which was prior in point of time is not known; and the connection between the two as cause and effect was certainly as strong in that case as here. That the acts occurred at different places instead of at the same place, again makes this an *a fortiori* case as compared with that.

The familiar cases of *Louisiana* v. *Wood*, 102 U. S. 294, and *Chapman* v. *County of Douglas*, 107 U. S. 348, though not cases of embezzlement, rest upon the same base in principle, that is to say, where money is paid upon an unauthorized contract, and applied to the use of the person entitled to receive it were the contract authorized, that person will be compelled, in some form of action, to repay. And the same principle was again applied in *Logan County Bank* v. *Townsend*, 139 U. S. 67.

In *Blanchard* v. *Commercial Bank*, 44 U. S. App. 556; 75 Fed. 249, a case where money had been borrowed for the use of a bank by its president, without authority delegated for that purpose, the Court was pressed with the decision in the *Western National Bank* case to the effect that the bank was not bound by a loan made by its president without special authority, and met this claim with the finding of the Court below that the bank had received the benefit of the money borrowed, quoting from the opinion of the Court below that the lending bank had placed the loan to the credit of the borrowing bank, from which it was drawn by the checks of the borrowing bank, as in the case at bar, upon which they say that the case is manifestly different from the *Western National Bank* case, and that:

"The distinction in the facts justifies the conclusion of the Court in this case that the Commercial Bank is entitled to recover judgment, not upon the ground that Atkins was authorized by the directors of the Whatcom Bank to borrow the money, but upon the ground that it received and appropriated the same to its own use and benefit."

Perkins v. *Boothby*, 71 Maine, 91, presented this state of facts: The defendants were a corporation whose agent, Cleasby, without authority, borrowed money from the plaintiff, giving its notes therefor, and used the money borrowed to pay its debts. The directors of the corporation had no personal knowledge of the loan, notes, or application of the proceeds, until after the corporation had ceased to do business and gone into liquidation, when they repudiated both loan and notes, but left the appropriation of the proceeds undisturbed. It was held that by thus retaining the benefit derived from the loan, the corporation became liable as for money had and received for the amount borrowed, with interest.

In *Gunster* v. *The Scranton Illuminating Heat & Power Company*, 181 Pa. St. 327, it appeared that Jessup was treasurer of the above named company which, for convenience, we shall call the Power Co., and was also vice-president of the Scranton City Bank, and its managing executive officer. As treasurer, on May 13, 1889, he drew a note of the Power Co. for $5,000, and discounted it at the bank, the Power Co. being credited with the proceeds; then, likewise as treasurer, he checked upon that account to the order of New York exchange for $6,000; and as vice-president of the bank, he paid that check by two drafts on New York, both drawn by him as vice-president of the bank to his own order individually—one for $4,000, and the other for $2,000. He drew the money upon these drafts and appropriated it to his own use. The bank having become in-

solvent, its assignee, Gunster, brought this suit against the Power Co. upon the note above mentioned among others. The Court below had held that inasmuch as Jessup was the only officer representing the bank who acted in the transaction, the bank was chargeable with the knowledge which Jessup had that he, as treasurer of the Power Co., had no authority to draw the check. The Supreme Court held this to be erroneous for reasons upon which we need not dwell, and then continue (pp. 338–339):

"The real question is, in what capacity did Jessup commit the fraud? And it is clear that it was as treasurer of the appellee. It was as treasurer he presented the notes for discount, and as treasurer he drew the checks for the proceeds. Both acts were within his authority as treasurer and would have been lawful if they had been honest, but he drew the money on drafts which were the property of the company, and when he embezzled the money it was the money of the company. The bank had no part in his act, and gained nothing by it. The fraud had its inception and its consummation in acts done in his capacity of treasurer of the defendant company, and it should bear the loss."

No diagram is necessary to show the appositeness of this conclusion to the case at bar.

Another case in point is *Bank of Lakin* v. *National Bank of Commerce*, 57 Kan. 183. The suit was brought by the National Bank of Commerce against the Bank of Lakin on two notes signed by the latter by its cashier. The Bank of Lakin denied the authority of its cashier to borrow the money, and counter-claimed for collateral which had been sent with the notes and collected. The Court below gave judgment for the plaintiff, finding that the money borrowed had been received by the Bank of Lakin, and that the only payment thereon had been from the collaterals. This finding was excepted to as not sustained by the evidence, which, so

far as appears from the report, was only that the notes had come by mail, were discounted in regular course, credited to the Bank of Lakin, and the proceeds in part expressed to it, in part paid on its drafts, and in part sent to its Eastern correspondent for credit to it. The judgment was affirmed. There was a suggestion that the cashier had misappropriated part of the money by purchasing property with it in his own name; but the Court said that the evidence supported the finding that the Bank of Lakin had actually received the money borrowed, and

"If so, it would make no difference that its cashier had appropriated a part of the same to his own use. A principal can not receive and retain the benefit of a transaction, and at the same time deny the authority of the agent by whom it was consummated."

Similar applications of the rule for which we are now contending will be found in some of the cases cited under Propositions IV and V, *supra*, and also in the following:

Bank of Commerce v. *Bright*, 39 U. S. App. 483; 77 Fed. 949.

Chemical National Bank of Chicago v. *City Bank of Portage*, 156 Ill. 149.

Johnston-Fife Hat Co. v. *National Bank of Guthrie*, 4 Okla. 17.

Conn. River Savings Bank v. *Fiske*, 60 N. H. 363.

Thompson v. *Bell*, 10 Exch. 10.

Burke v. *M. L. S. & W. Ry. Co.*, 83 Wisc. 410.

Ditley v. *Dominion Nat. Bank*, 43 U. S. App. 613; 75 Fed. 769.

We submit, therefore, that upon any view which can be taken of this case, the liability of the Fidelity National Bank is clear. The money of the Chemical Bank was ac-

tually credited to it, and has been actually applied by it to the payment of its acknowledged debts. This being so, it must account for what it has thus received. Nor does it matter what other moneys any of its officers may have stolen.

VII. THE WESTERN NATIONAL BANK CASE DISTINGUISHED.

Having now argued the various grounds upon which the liability of the Fidelity Bank for the money loaned to it and applied to its use by the Chemical Bank should be sustained, we are prepared to consider more intelligently than at an earlier stage of the argument the difference between the case at bar and that of the *Western National Bank* v. *Armstrong*, 152 U. S. 346. Our opponents will, of course, contend, as they did in the courts below, that this case is controlled by the opinion in that. We submit that this is not so because:

(*a.*) The cases differ materially in their facts.

(*b.*) The *dicta* in that case, supposed to be adverse to the Chemical Bank in this, rest upon a mistaken assumption of fact.

Differences in Facts.—These differences, which we have noted by comparing the records in the two cases, are as follows:

(1) There, up to the inception of the transaction, while there had been solicitation by the Fidelity Bank, there had been no business relations between the two banks; and when the money was credited the only prior transaction had been the remitting from New York of a small claim for collection. Here, the Fidelity Bank had long had a deposit account with the Chemical Bank; each bank had collected for the other; the Chemical Bank was one of the

reserve agents of the Fidelity Bank; and some similar transaction had previously been proposed (Rec., p. 22).

(2) There, Harper, in requesting the loan, did not ask it on behalf of his bank in terms, nor (as held by the Court below, though this Court did not pass upon this question) by implication. Here, the request was expressly made on behalf of the Fidelity Bank by Harper as its vice-president, and his action was confirmed by Baldwin as its cashier.

(3) There, the loan was on time—four months. Here, it was on demand.

(4) There, no obligation of the Fidelity Bank was transmitted with the request. Here, its certificate of deposit, signed by its cashier, was sent for credit.

(5) There, the record contained no evidence as to the scope of the powers usually exercised in the matter of borrowing money by officers of banks. Here, the record contains abundant and undisputed evidence that loans were always made on request of any active executive officer of the borrowing bank, including the vice-president and cashier, without showing authorization or ratification by its board of directors.

(6) There, the record was silent as to the powers exercised by Harper other than that he was vice-president and managing officer, *i. e.*, the general manager of the business of the bank. Here, the record shows in brief that he was permitted by the board of directors to manage the bank as he saw fit.

(7) There, all the letters from Cincinnati were signed by Harper individually; the letters from New York were addressed to Harper as vice-president. Here, the correspondence from Cincinnati relating specifically to the loan consisted of three letters signed by Harper as vice-president (one of which inclosed a certificate of deposit signed

by Baldwin as cashier), and one telegram signed Fidelity National Bank; from New York, one letter addressed to Baldwin, cashier.

(8) There, Harper purloined $195,000 of the identical credit given, through false drafts on the Western Bank issued after receiving advice by mail of the granting of the loan. Here, Harper did not touch the credit given at all; on the contrary, he took credit on the books of the Fidelity Bank on March 2, 1887, before he knew the Chemical Bank would grant the loan; his embezzlement, if he did embezzle, would have been just as complete and effective if the Chemical Bank had never granted the loan.

(9) There, the loan actually made was drawn out, so far as drawn at all, by false drafts not appearing on the books of the Fidelity Bank. Here, every penny loaned was drawn out by regular drafts appearing upon those books, and thus satisfying unquestioned obligations of the Fidelity Bank.

(10) There, the only account transmitted by the Western Bank was for the month of May, before the drafts were drawn; and while it showed a credit of $200,000, it said nothing as to a loan. Here, the account current for March sent from the Chemical Bank showed this credit expressly as a "Tem. Loan," *i. e.*, temporary loan, under date of March 2; it showed the drafts against the account including this credit; and further, that in spite of this credit the Fidelity Bank by April 1 had made an over-draft amounting to $32,695.97.

(11) There, the account current of the Western Bank which showed the credit, but *did not* specify it as a loan, was not audited by the bookkeeper of the Fidelity Bank, for he had no account with that bank on his books, but was taken by him to Harper, who kept it as a private matter of his own; thus it never got among the files and

papers of the Fidelity Bank. Here, the March account which showed the credit, and *did* specify it as a loan, was audited by the bookkeeper of the Fidelity Bank, found to be O. K., and filed with its papers; as the drafts charged to the Fidelity Bank appeared upon the face of the account, and agreed with the books of that bank, and as the balance was an over-draft by it, necessarily every cent with which it was credited upon that account, including this loan, had then been applied to its use; and whatever else Harper may have done he did not embezzle any part of this money.

(12) There, no usage had grown up between the banks as to such accounts, for this was the first of its kind. Here, there was such a usage by which the Fidelity Bank was required to note and report differences, with request for explanation as to matters not understood. No inquiry or allusion as to this loan was ever made by the Fidelity Bank, although it continued in business more than two months after receiving the account advising the loan, and although it made inquiry as to other matters appearing in that account. (Quinlan's answer of May 11, 1887, Rec., p. 269.)

(13) There, the position of the Western Bank was in no way altered by any action or non-action of the Fidelity Bank; the first two drafts were paid on June 3 and 4, before the account could have been returned audited; and the last draft was not paid until June 17, after the enlightening letters of June 9 and 13 had been received. Here, the position of the Chemical Bank was materially changed. Not only was recourse against Harper, who was then in good credit, lost, but The Jung Brewing Company note for $10,000 of the first collateral had been given back without substitution after the usual time for the report upon the account current for March had expired, on May

23 an exchange of collateral was made; the regular business between the banks continued; monthly accounts were rendered, compared and advised upon; in June a further advance was made by loan and over-draft, amounting to more than $300,000; and the Chemical Bank has given up the June collateral and collections, which it could not hold to secure the March loan, but might for the over-draft resulting from repudiating that loan.

(14) There, no evidence was offered tending to show ratification by the receiver or creditors or stockholders of the Fidelity Bank. Here, such ratification is established not merely by their long acquiescence, and the direct acknowledgment of the receiver of the existence of the loan, but by their pursuing and recovering from the directors for suffering the loan to be made.

To sum up these differences in a few words, they are as follows:

(*a*) There, no evidence appeared to show a loan was authorized. Here, such evidence does appear.

(*b*) There, it appeared affirmatively that the Fidelity Bank did not get the actual benefit of the money loaned. Here, it appears affirmatively that it did get that benefit.

(*c*) There, there was no evidence of ratification. Here, there is abundant evidence of it.

(*d*) There, the result reached was correct, for the reason assigned by the Court below—that the request, on its face, was not for a loan to the Fidelity Bank, but for a discount for E. L. Harper. Here, Harper individually had no apparent connection with the transaction requested.

With such differences as these existing, we submit no justification can be found for a claim that the decision in the *Western National Bank* case is controlling here.

Dicta rest on mistaken assumption.—The following quotations from *Western National Bank* v. *Armstrong*, 152 U. S. 346, 350, give fairly, we think, the essential parts of that opinion bearing upon the power to borrow money:

"There is no evidence whatever that the board of directors of the Fidelity National Bank gave any authority to Harper to borrow money on behalf of the bank, much less to borrow so enormous a sum on so long a time." . . . "The most that can be claimed in this case is that Harper acted as the principal executive officer of the bank. It can not be pretended that, as such, he had power, without authority from the board, to bind the bank by borrowing $200,000 at four months time.

"It might even be questioned whether such a transaction would be within the power of the board of directors."

The Court then quotes from the eighth section of the National Banking Act (Rev. Stat., sec. 5136, par. 7), and continues:

"The power to borrow money or to give notes is not expressly given by the act. The business of the bank is to lend, not to borrow, money; to discount the notes of others, not to get its own notes discounted."

Then, after quoting from *First National Bank* v. *National Exchange Bank*, 92 U. S. 122, 127, a passage included in that we have quoted *supra*, p. 86, showing that by necessary implication a bank has power to incur liabilities in the regular course of its business, the Court continues:

"Nor do we doubt that a bank, in certain circumstances, may become a temporary borrower of money. Yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money.

"Even, therefore, if it be conceded that it was within

the power of the board of directors of the Fidelity National Bank to borrow $200,000 on time, it is yet obvious that the vice-president, however general his powers, could not exercise such a power unless specially authorized so to do, and it is equally as obvious that persons dealing with the bank are presumed to know the extent of the general powers of the officers."

The conclusion thus reached by the Court rests, it will be seen, entirely upon the premise stated by it, that: "The business of the bank is to lend, not to borrow money; to discount the notes of others, not to get its own notes discounted." Upon this foundation is built the superstructure, first, that the temporary borrowing of money is "out of the course of ordinary and legitimate banking;" and, secondly, that special authority is essential to validate such a loan. If the major premise, the foundation of the argument, be unsound, the whole structure falls.

This premise is manifestly a statement of fact. Such statements are conclusive only as to the particular case in which they were made. However positively asserted, they are never more than persuasive in other cases; they can not be conclusive upon even the same tribunal in such manner as to prevent it from seeing a manifest error disclosed by further illumination of the subject. Witness the decisions of this Court in *The Genessee Chief*, 12 How. 443, and *Pollock* v. *Farmers' Loan and Trust Co.*, 158 U. S. 601.

As we have said, what is embraced in the business of banking is a question of fact, not of law. Its solution depends upon the usage of bankers, what they are habitually or commonly accustomed to do. This is different from the question as to what may be the powers of any particular bank. The latter will depend upon whether the bank be created by statute, or by private agreement between individuals, or be the property of but one person, and will

involve questions of law as to the interpretation of such statute or agreement. But *the banking business* means the business transacted by banks generally, no matter how created; and what that business is, depends simply and solely upon what banks are accustomed to do. Whether any particular bank can do every thing germane to the banking business, depends upon the charter or other constating instrument creating that bank.

It will be observed that this Court in the *Western National Bank* case does not find any limitations upon the borrowing power imposed in terms or by implication by the National Banking Act. It rests its conclusion solely upon the ground that borrowing is not incident to the banking business, or to use the words of the Court, is "out of the course of ordinary and legitimate banking." This is simply and purely a question of fact. Its existence is not affected nor conclusively disproved by a statement in the opinion of any Court, no matter how weighty or deserving of respect the pronouncements of that Court may be. One seeking to learn what is, in truth, within the course of ordinary and legitimate banking, will not rest with the assertion of any one man or any one tribunal, but will test that assertion by examining the nature of the business and the manner in which it is actually done; what history tells us as to how it has been done in the past; and what judicial opinions and legislation show us has been heretofore considered incidental, usual and necessary in that business.

From these sources of information we have garnered; and the fruits thus stored we have spread before the Court. It thus appears that from time immemorial borrowing has been a matter of course in banking, borrowing in all its forms; that it has been the uniform custom for one bank to lend to another on the application of either president, vice-

president, when actively engaged, or cashier of the borrowing bank; that when the power has been the subject of legislation, it has been either expressly granted, or plainly recognized by limiting its abuse; and that the Courts have held it to be incident to the banking business.

Considering that transactions like that at bar had been sustained by repeated decisions of the Court of Appeals of New York, where the lending bank was located, and by the Courts of last resort wherever else such questions had been submitted, and had been inferentially approved by the Supreme Court of Ohio, where the borrowing bank was located; and consequently that had the question of the validity of this loan been submitted to counsel for advice at the beginning of negotiations, the opinion, whether given by members of the bar of New York City, or of Cincinnati, must have been that the transaction was entirely regular, to hold now that such a loan was invalid will be more than a surprise. Such a ruling will extend far beyond the narrow circle, relatively, of the banking business, and will disturb the views that have hitherto been entertained in the whole field of corporate agencies. It will endanger and unsettle vast interests and obligations to an extent seldom worked by a judicial determination.

And if to this be added a further ruling that not only was the loan so beyond the scope of apparent authority as to require evidence of special authorization, but that upon the facts in the case at bar it never has been ratified nor applied to the use of the borrowing bank so as to make it liable therefor, and that the appellant, as receiver, may keep $300,000 of money loaned by the Chemical Bank in good faith and according to established usage, a custom and usage approved and confirmed by a long line of judicial decisions, then, we submit, that neither the business community,

nor the legal profession in advising business men, can say what landmark of the law can thereafter be considered immovable.

VIII. EFFECT OF COLLATERAL UPON BASIS FOR DIVIDENDS.

The recent decision of this Court in the case of *Merrill, Receiver*, v. *First National Bank of Jacksonville*, Nos. 54 and 55 upon the docket of the present term, relieves us from any discussion of the third, fourth and sixth assignments of error. That case was decided by the Court below upon the authority of the decision of the Court of Appeals in the case at bar. The arguments there, so far as this question was concerned, were by counsel now before the Court. The Court has expressly approved the reasoning and the conclusion reached upon this question by the Circuit Court of Appeals in the case at bar. In view of these facts we do not consider ourselves at liberty, without invitation from the Court, to discuss again matters so recently argued by our opponents as well as by ourselves, and so thoroughly considered by the Court. The decision there made by this Court,—that dividends must be declared upon the amount due upon the claim as it stood at the date of the declared insolvency of the failing bank, without regard to what collateral security the creditor may then have held except so far as necessary to show when his claim is paid in full,—not only relieves us from discussing, as we did in that case, which of the four rules for distribution of assets should be applied to an insolvent national bank, but renders it needless for us to debate other questions which might have been pertinent had the Court held that any of the other rules than the one adopted should be applied, and from urging here, as we did below, that under any of

the other rules the result reached in this case would have been substantially the same, because the collaterals which were collected before proof of claim were not the property of the Fidelity Bank, and were used by Harper in breach of trust, so that the debtor thereon would himself have had a right of action against the Fidelity Bank in so far as he might be compelled to pay the same to the exoneration of that bank; and for the same reason, if we admit that part of that collateral was lost through negligence, this negligence caused no damage to the Fidelity Bank.

IX. INTEREST ON DIVIDENDS.

It has been settled that where a claim against an insolvent national bank has been disputed by its receiver and is afterward judicially established, the claimant is entitled to interest upon the dividends declared in the meantime from the date of their declaration. *Armstrong* v. *American Exchange Bank*, 133 U. S. 433. As the statutes direct no form in which claims must be proved upon presentation to the receiver, but merely require him to pay ratable dividends "on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction" (Rev. Stat., sec. 5236), we had supposed that any form of presentation which acquainted the receiver with the existence of the claim was sufficient unless he demanded further particulars; that the object of the statute was to enable the receiver to determine approximately the amount of the claims that existed, so that in declaring dividends he might have regard not merely to the claims which were established to his satisfaction, but to those which might be established against his will, and thus to secure equal treatment ultimately for all. Hence, as Armstrong, the receiver, was advised of the existence of this

claim as early as July 6, 1887, if not before (Rec., p. 268), and as, in his letter of November 14, 1887 (Rec., p. 24), Armstrong, being then fully advised as to the facts, did not dispute the validity of the claim, but only the right of the Chemical Bank to pay it from the proceeds of the June collateral, we had contended in the Court below that the Chemical Bank was entitled to interest upon dividends from the date of their declaration respectively, although it had made no formal proof of its claim until 1890 because it believed until that time that it had a right to apply the June, as well as the March, collateral to the claim, and that in that way it had received payment in full. The Court below, however, held formal proof of claim was necessary to start interest upon dividends, and that the Chemical Bank, as to dividends declared before it filed such formal proof in April, 1890, could receive interest only from that date. That bank has taken no appeal from this decision, so the matter is not open here for debate. We state it only to advise the Court as to the discussion below.

Our opponents contend, however, that the answer of Armstrong (Rec., p. 101) to the Chemical Bank's proof of claim precludes that bank from receiving interest upon dividends on $200,000 of its claim.

The Chemical Bank refused to accept the proposal made in that answer because its counsel thought the proposal hazardous, in that its acceptance would have involved splitting an entire claim, and in effect putting part of it into judgment (*National Bank of Commonwealth* v. *Mechanics' National Bank*, 94 U. S. 437), and thus giving persons having opposing rights the opportunity to say that the balance of the claim was waived,—making the very argument which was made by one of our opponents in *Merrill* v. *National Bank of Jacksonville*, No. 54 of the docket of this Court at this term (see pp. 7 and 8 of Mr. Oldham's brief

in that case); and that the proposal was unfair, not only in that it involved a promise of restitution which the receiver had no right to require, but a further promise that if the Court should hold that the dividends should be computed according to the *Kellock's* case rule (to give these rules the names that were used in the argument of the *Merrill* case just mentioned), yet settlement should be made as if the bankruptcy rule were the one to be applied. And when this cause was heard in the Court below, we urged not only these matters, and that the offer was not in itself such a tender as could stop the rights of the appellee to interest, but that when the amended answer was filed and the validity of the claim *in toto* was attacked, the offer was necessarily withdrawn and lost whatever force it might otherwise have had; and we suggested that if the Court were not satisfied with the correctness of this last position, should they determine to remand the cause for the purpose of taking additional evidence as to the validity of the loan, they should also permit evidence to be taken as to the negotiations between the parties with reference to this subject.

The Court below held that our position as to the effect of filing the amended answer, and thus attacking the validity of the loan, was well taken, saying (31 U. S. App. 65, 82):

"We quite agree with counsel for the Chemical Bank that the raising of such an issue must be considered to be a withdrawal of the previous offer by the receiver, and therefore that the offer can not now be used as a ground for refusing the payment of interest upon dividends upon the whole claim for the period after April 25, 1890, when the claim was presented and rejected, down to the time when such dividends shall be paid."

In view of this we consider it hardly fair to suggest,

as do our opponents (their Brief, p. 108), that the Chemical Bank made no answer to Armstrong's offer, nor attempt to remove any obscurities in its language. As a matter of legal duty or moral obligation, we do not suppose our client was called upon to give other answer than the record shows. But however that may be, it is very certain that there was no occasion to introduce into the record proof as to what action was taken when we see that after an allegation of this offer had been made in the original answer (Rec., pp. 11–12), coupled with a practical admission of the validity of the claim, this allegation and admission were both suppressed in the amended answer, and issue taken there upon the validity of the loan (Rec., pp. 17–20).

Counsel for the appellant in effect urge that the Court should relieve him from the consequences of the election he thus made at the beginning of the litigation, and should guess what would have been the length of the litigation if he had continued upon the line of defense suggested in his original answer, and to deny the appellee interest for that period. The statement of such a claim is, we submit, its sufficient refutation. Never before, we suppose, was it seriously contended that a conditional offer to pay *part* of a valid claim must be accepted under penalty of losing interest upon the part included within the offer. And when to such a contention—for that is all Armstrong's offer to pay dividends amounted to—is added another, that such an offer remains effective to stop interest even after the validity of the whole claim is denied, then it stretches credulity to suppose that the contention is seriously made.

X. REVIEW OF BRIEF FOR APPELLANT.

We have been compelled to postpone discussion of our opponents' brief upon the merits of the case till this time, as we did not receive it until our own had been completed up to page 161 *supra*, and partly printed.

The second and third heads of their brief, contained in pages 53–107, which discuss the basis for dividends, and were, as we understand, prepared and printed before the decision of this Court in *Merrill* v. *National Bank of Jacksonville*, No. 54 upon the docket of this term, was announced, require no comment from us, for the reason we have stated *supra*, page 161. The argument by them made is substantially the argument presented by the same counsel in the Merrill case, and is answered by the decision in that case.

While we think we have anticipated substantially all of their argument as to the liability of the Fidelity Bank, we trust we may be pardoned for adding to this brief, already unusually lengthy, some words of comment upon matters they have presented and authorities they have cited.

In the first place there are some errors in statements of fact to which attention should be called.

On page 4 they say that on February 28, 1887, "E. L. Harper did not have $300,000 to his credit in the [Fidelity] bank, and he had not deposited that sum, or any part of it, as the basis of such a certificate," and, on page 17, they repeat the statement that he had deposited no money as a basis for the certificate. The evidence does not establish these facts. All that there is directly upon the subject is in question 27 to J. Harry Watters and his answer (Rec., p. 74):

"Q. 27. What paper or obligations, if any thing, was given by Mr. Harper to the Fidelity National Bank at that time? A. There is none that I know of."

This is not proof that at that time Harper did not have more than $300,000 to his credit upon the books of the bank.

At the bottom of page 25 they suggest that Harper's activity in the management of the Fidelity Bank was entirely unknown to the Chemical Bank, so far as the testimony discloses. Considering that the dealings between those banks had begun with the birth of the Fidelity Bank, and that Harper's dominating sway had begun at the same time, as this record shows, we submit that the proof is amply sufficient to raise the presumption that the Chemical Bank was well acquainted with the fact that he was at least an *active* officer. And his own correspondence with that bank furnishes confirmation.

On page 48 it is intimated that Harper may have had telegraphic information on March 2d that the Fidelity Bank had granted the loan. There is no warrant in the record or elsewhere for this supposition. The only information given by the Chemical Bank upon this subject at that time was its letter of that date.

On p. 10 our opponents say (*italics* theirs): "The Chemical Bank knew, as admitted by its president and its cashier, that E. L. Harper had *not* deposited $300,000 in the Fidelity." At the bottom of p. 14 they say that as both of these officers "knew exactly what the certificate of deposit meant, it has no legal significance in this case." And on p. 17 they contend that these officers must have known that the certificate was irregularly issued and stated an untruth; and having been issued merely for the

purpose of borrowing money that they must be charged with notice of the subsequent use of the money obtained by the use of the certificate. The claim of counsel attributes more knowledge to the officers of the Chemical Bank and charges them with more admissions than the record warrants. It is true that those officers, as well as others, say that certificates of deposit are very commonly forwarded with applications for loans; and that it is also common in such cases to issue such certificates without there being a real deposit to support them. But these facts alone are not sufficient to charge the officers of a lending bank with notice that any particular certificate does not represent a real transaction. The certificate is a negotiable instrument, and with reference to it, as to all other instruments of its class, to charge a purchaser with knowledge of facts impeaching its validity it is not sufficient to show that he knew matters which should have made him suspicious; where the instrument is regular upon its face, the proof must go farther and show actual knowledge of the invalidity. *Goodman* v. *Simonds*, 20 Howard, 343. With reference to certificates of deposit received under such circumstances as this one was, the testimony of the officers is that when such documents are presented to them, they know nothing as to the facts with reference to their issue; they take the instruments at their face for what they represent, and know nothing as to what occurs at the other end (Rec., p. 44, XQ. 156; p. 126, XQQ. 17–18; p. 133, XQ. 25). This they are justified in doing for the reasons just mentioned. Indeed from a banker's point of view, there is nothing irregular or suspicious in a certificate of deposit sent with an application for a loan. This will be apparent upon reading the testimony of the bankers who uniformily speak of such a document as being one of the customary evidences given in effecting a loan. Presump-

tively, therefore, it is not an irregular instrument, but one duly authorized. Whether consideration were given for it or not by the person in whose favor it is drawn is purely a matter of form. If he made such a deposit, he has lent his money to the bank, and also his credit, by allowing them to use the voucher they gave him. If he deposited no money, then the certificate is but the equivalent of the note of the bank upon which he is an accommodation endorser.

The further contention above mentioned, that the Chemical Bank, having knowledge that the certificate was issued merely for the purpose of borrowing money, must be charged with notice of the subsequent use of that money, presents a clear case of *non sequitur*. Knowledge that money was being borrowed would not carry with it notice of the use subsequently to be made of that money. We may add, however, that the Chemical Bank in fact did see to the subsequent application of the money which was borrowed, paid it out only upon checks of the Fidelity Bank, and reported these payments; and that each payment so reported was confirmed as authorized.

The case of *Farmers' & Merchants' National Bank* v. *Smith*, 23 C. C. A. 80, which our opponents have cited in this connection, lends them no support, but on the contrary is adverse to their views. The ground upon which that case was decided was that the act done was *ultra vires* as to the bank itself, and therefore necessarily beyond the apparent scope of the authority of one of its officers. The reasoning concedes that had the act been within the power of the bank, it would have been bound. The case is officially reported in 40 U. S. App. 690.

It is suggested that the witnesses as to custom were from lending banks only, and that they were indifferent as to authority as they took collateral to make them

safe; and further, that even they said it would be improper for the executive officer to effect the loan without conferring with his directors (Brief, pp. 19–24). The answer to this argument was very satisfactorily given by the Court below (Rec., pp. 344–345).

But in addition we may add with reference to the suggestion as to the collateral, that it is the habit of banks to take collateral to secure loans whether the loan be to an individual or to a corresponding bank. The argument of our opponents necessarily concedes that the lending bank would acquire good title to the securities pledged as collateral, and could indemnify itself out of them without regard to the responsiblility or the legal liability of the borrowing bank for the loan as an obligation. Thjs concedes the whole ground so far as the pledged collaterals were assets of the borrowing bank. The same agent who could *give a valid pledge* of them to raise money can *promise to repay* the money; and it is difficult, if not impossible, to see how the debtor bank can be any more injured by holding it directly liable for repayment than by holding that its assets may be devoted to such repayment by the pledgee.

Further, this whole argument as to custom shows a complete misapprehension of the nature of the question to be answered. That question is, not what is the custom in the internal management of the borrowing bank, but what authority does custom require the officers of the borrowing bank to show to the lending bank; in other words, what by custom is the apparent scope of authority of a bank officer. It is no answer to this to show what real authority a bank officer should get before he attempts to exercise his apparent authority. Of course no honorable bank officer would borrow money for his bank without first consulting his board of directors, where such consultation was practicable. But whether, having obtained their ap-

proval, he is required to communicate that approval to the lender, or the lender is required to demand proof of it, is a very different matter, and is the very matter with which we are now concerned. To repeat, the focus of observation is not the office of the Fidelity Bank in Cincinnati, but of the Chemical Bank in New York; and the question is, whether, upon the information submitted to it, that bank, by the custom of bankers, was justified in believing the request made to it for a loan to be authorized. To that question but one answer can be given.

It is suggested (Brief, p. 25) that such a custom was illegal in its inception, and can not become legal through age. Surely this claim was inconsiderately made. No statute is referred to declaring the custom illegal. It was in vogue, as reported decisions show, long before the National Banking Act was passed. And that it is not unreasonable is shown by the fact that it is but the application to banks of a principle well established with reference to other corporations that have occasion to borrow money; and indeed is no more than the doctrine running through the whole law of agency, that whoever employs a general agent empowers him to do all things that such an agent generally does. To the query put by our opponents as to how banks are to protect themselves, we suggest that the remedy is for them to employ honest agents, put them under bond if need be, and if they do not do that, at least to watch the accounts of their correspondents. And if their agent deceives them, let them pay the loss rather than try and throw it upon another.

The argument made on p. 28, that the Chemical Bank in making the loan did not rely upon any apparent authority conferred by the directors, could have been made as well in any of the cases which we have cited upon that

proposition. This alone shows its fallacy. If the directors had exercised proper supervision and control, Harper would not have undertaken the things he did.

And even were there force in the argument, still it does not meet the other proposition that the neglect of the directors, their abdication in favor of Harper, was the cause why they did not discover what he had done. The Chemical Bank certainly did rely upon the effectiveness of the notice it had given that it had made the loan as requested; and because of this reliance, and upon the faith of it, it paid drafts, exchanged securities, and made further advances, which it never would have done had Harper's acts not been suffered to appear as those of his bank.

The whole argument of our opponents upon the subject of ratification (Brief, p. 29, *et seq.*) is based upon the fundamental misconception that *actual* knowledge of the material facts must be brought home to the directors. Such is not the law; for while it is commonly said that there can be no ratification without knowledge, yet this is always with the qualification implied, if not expressed, that notice, which if pursued would lead to knowledge, is equivalent to knowledge, and that it is sufficient if this notice be given to an agent while in the conduct of his principal's business. Neither Mr. Meacham nor Mr. Morse is gifted with the superhuman faculty of expressing every thing relating to the subject in one phrase. What they say in the sections quoted on pages 32 and 33 of our opponent's brief is to be taken in connection with what they say elsewhere as to the effect of notice to an agent; see Meacham on Agency, secs. 718, 731, and Morse on Banking (3d ed.), secs. 98(k), 107.

There is nothing in any of the decisions which have been cited by our opponents which is either inconsistent with

this proposition, or with any part of the argument we have made. In some of them the principal having authorized his agent to do a specific thing, and no more, the agent has undertaken to make a collateral contract; and it has been held that the principal who receives and retains the proceeds of the transaction which he has authorized, without notice of the collateral contract, is not bound thereby. We do not dispute this proposition; the making of the collateral contract was not within the apparent scope of authority of the agent; and in receiving from the agent what he did receive, the principal was receiving only what he had a right to expect to receive under the authority previously given to the agent. The distinction between such cases and that at bar is carefully pointed out in the opinion in *Smith* v. *Tracy*, 36 N. Y. 79, 82–84, which is one of the cases of this class cited by our opponents. Another is *Wheeler* v. *N. W. Sleigh Co.*, 39 Fed. 347.

Another class of cases cited by them is where an agent, having made an unauthorized transaction in his principal's name, pays over the proceeds to his principal upon an indebtedness of his own to the principal—the latter receiving them without knowledge or notice of the real consideration moving to the agent. And it is held that the principal who receives money from his agent in settlement of a known existing liability is not chargeable with knowledge of any fraud committed by the agent in obtaining the money. Within this class fall *Thatcher* v. *Pray*, 113 Mass. 291; *Baldwin* v. *Burrows*, 47 N. Y. 199; *Bohart* v. *Oberne*, 36 Kan. 284. These cases are altogether different from that at bar. There the transactions between the agent and the principal were actual transactions, the agent in person dealing with the principal in person, or with some other representative of the principal. Here the only transactions between Harper and his principal, connected in any way with the case at bar,

were by and through Harper only; that is to say, Harper individually dealt with Harper as agent for the Fidelity Bank. The difference between the two classes of cases is pointed out in the very thoroughly considered opinion in *Atlantic Mills* v. *Indian Orchard Mills*, 147 Mass. 268.

Another class of cases cited by our opponents is only to the effect that the burden of proof to show knowledge or notice requisite to ratification is upon the person claiming ratification. Within this class fall *Combs* v. *Scott*, 12 Allen, 493, and *Murray* v. *Nelson Lumber Co.*, 143 Mass. 250. While the authorities are not unanimous upon this as a proposition of universal application (see *Patterson* v. *Robinson*, 116 N. Y. 193), yet we have no quarrel with it here. The cases cited in its support only tend to show that no duty rests upon the principal having no notice of irregularity to inquire whether there was irregularity; they in no way tend to show that a principal, who through himself, or his agent, has notice of an unauthorized act of which he is reaping the benefit, can use the crop without being chargeable with all the knowledge which pursuit of the notice would bring him.

First National Bank v. *Hanover Bank*, 66 Fed. 34, and *State National Bank* v. *Newton National Bank*, 66 Fed. 694, cited by our opponents, were cases where an agent having contracted a debt upon his own responsibility, assumed in the name of his principal to guarantee the payment of it. They fall within the principles settled by *West St. Louis Savings Bank* v. *Shawnee County Bank*, 95 U. S. 557. No one lending money to an agent, or dealing with an agent on his own individual account, can safely trust his representation that he can pledge his principal's credit in the transaction. But that is not the case at bar; those cases would have been applicable to this if the loan here had been made to Harper individually upon his individual re-

sponsibility, although the proceeds were credited to the Fidelity Bank. But the loan was not so made, nor was there any pretense that the Chemical Bank gave credit to Harper as an individual.

Schutz v. *Jordan*, 32 Fed. 55, was decided simply on a question of pleading, viz., that the suit was for goods sold and delivered. The Court expresses no opinion as what would have been the result had the suit been in trover for conversion, or in *assumpsit* for money had and received.

In the *Phosphate of Lime Co.* v. *Greene*, L. R. 7 C. P. 55, so far from its being held, as one might suppose from reading the quotations in our opponent's brief (p. 35), that actual knowledge in the principal—if an individual, or in its immediate representatives—if a corporation, was necessary, the decision was that the notice which was given to those representatives was sufficient to carry with it knowledge, because it suggested an inquiry which would have led to knowledge. In other words, the statement in an account furnished stockholders that certain shares of the stock of the company were in its name as "Shares forfeited for non-payment of calls," was sufficient to impute to those stockholders, assembled in corporate meeting, knowledge that those shares had been received from promoters in compromise of a liability of the promoters to the company for borrowed money.

We have already (*supra*, p. 136) referred to *American Surety Co.* v. *Pauly*, 170 U. S. 133, and there is nothing in that case inconsistent with our contention. It presented a totally different state of facts and called for a different rule of law.

Our opponents in discussing the notice given by the account current for April (Brief, pp. 42–45), are compelled

to urge that one who receives an account is obliged to notice only the charges against him, and may disregard the credits given him. This is, truly, a novel theory, and shows the straits to which they are reduced. In brief, it is that one who receives information telling him his own books are falsely kept may safely disregard that information. Surely, such a claim needs no argument to refute it; and if it were necessary to refer to authority, *Kissam* v. *Anderson*, 145 U. S. 435, and *Marsh* v. *Keating*, 2 C. & P. 250, were both cases where, as in this, the notice was given by an entry upon the credit side of the account.

Our opponents also ignore the significance of the reconcilement sheets and correspondence after the receipt of the account for March. As we have stated, these show that other matters in the March account were the subject of correction; and this was proof of the strongest nature to the Chemical Bank that this particular entry was approved and confirmed. Whether these letters and accounts were matters which would ordinarily have been submitted to the inspection of the directors, had they indicated nothing irregular, is not, as our opponents seem to think, the real question at issue; but whether they *should* have been submitted to the directors, since they *did* indicate irregularities. The directors put their subordinates in office and devolved part of their own duties upon them. By so doing, they make the bank responsible for the neglect of their subordinates; and they are fully chargeable with notice of what they would have learned had they been performing the duties which they cast upon their subordinates.

In discussing the question of ratification and our contention that the receiver ratified the loan by the Chemical Bank to the Fidelity Bank, counsel for appellant concede

that the receiver brought suit against the directors for having been

"negligent in attending to their duties, and in the continued employment of Harper. This it was his duty to do. He also named *the present alleged loan as one of his fraudulent acts.* That suit was not to recover from Harper *the amount of that loan* as having been paid to him. It was for *damages* growing out of his *fraudulent acts*, and could not in any way affirm and legalize what would otherwise be illegal. . . . The suit was for damages done to the bank by the negligence of the directors. This suit was compromised by the payment of $450,000, by the directors. . . . This damage was done to the bank whether this claim is a valid or an invalid one. In either case this act was a factor in bankrupting the bank and a subject for damages against the directors for placing Harper in the position which he occupied." (p. 47, *italics* ours.)

We have already argued that there could be no claim for damages because of the making of this loan unless by its making the loan became a liability; for without liability there was no damage. But these remarks of our opponents tempt us to a further discussion of this subject.

That negligence, as alleged in the bill, consisted in committing all power to Harper and allowing him to conduct and operate the bank without superintendence or control. It is impossible to see how their negligence, or the "fraudulent acts" of Harper in the matters now under review, could have damaged or injured the bank unless the bank was legally bound to repay to the Chemical Bank the loan made by it to the Fidelity Bank. If not so bound, it was quite sufficient that the Fidelity Bank, or the receiver as its successor and representative, should refuse payment. If that refusal be correct and be sustained by the courts, the bank was in no degree damaged.

But the receiver did not take this view of the situation. He goes into Court with an allegation of damage, and gives this loan as one of his items of damage. To simplify the matter, suppose this loan had been $450,000, and had been the only item of damage. The receiver gets the full amount from the directors, and if he succeeds in defending an action by the Chemical Bank to recover the loan, the result would be that not only would the Fidelity Bank have suffered no damage, but clearly the receiver would have made for the bank $450,000.

If the receiver's contention that the loan was unauthorized be well founded, he had his election to reject the claim and stand by his rejection, or to waive the alleged irregularity, concede the liability of the Fidelity Bank to the Chemical Bank, and sue Harper and his co-directors for damages caused to the Fidelity Bank by negligence and fraud. But he can not have both remedies. He has elected to ask for damages, and obtained them. That he secured them by compromise instead of judgment is wholly immaterial. The action for damages was an irrevocable election, and the amount paid was in satisfaction of the claim set up in the receiver's bill in equity.

In the receiver's bill of complaint against the directors, he charges that Harper converted to his own use "very large sums of *money belonging to said association*, . . . but he avers the aggregate amount thereof to be not less than the sum of $500,000," and that he and his co-defendants "did issue the drafts, bills of exchange and other *obligations* of said banking association," for which it received no consideration, and which they converted to their own use (Paragraph 21 of Bill, p. 284 of Record); and that Harper was allowed absolute control of the bank (Par. 20, p. 283, and Par. 23, pp. 284–285 of Record).

It is thus seen that in that suit the receiver charged

Harper with embezzling and converting to his own use *the money and assets of the association*, and it is admitted that one instance was the manipulation of the loan of the Chemical Bank to the Fidelity Bank.

He could not have converted to his own use the money of the Fidelity Bank unless the money belonged to the bank and not to him, nor did he embezzle the money of the Chemical Bank. The money could not have belonged to the Fidelity Bank unless the loan by the Chemical Bank vested title in the Fidelity Bank. When title vested in the borrower the obligation to repay attached.

The two remedies, repudiating the debt, and suing the directors for damages, are so palpably inconsistent that they can not co-exist for a moment.

It can not be said that the doctrine of election applies only as between two or more affirmative remedies, and not as between an active remedy and a decision not to recognize and pay a demand. The equity of the doctrine is the same in either case, the reasons for it just as strong. Moreover, the appellant is pursuing an affirmative remedy in this action. He seeks to recover $100,000 of the Chemical Bank. For the protection of appellant the decree of reversal, allowing either party to take additional testimony, was so framed, "That if the issue be decided in favor of the receiver, the bill should be dismissed, and a decree entered in favor of the receiver for the restitution of the $100,000 paid by the receiver July 25, 1892, to the Chemical National Bank on the faith of the decree below."

There has therefore been, by the bill against the directors: (1) A complete election, and (2) a complete admission of the liability of the Fidelity Bank, by the allegation of *ownership* of the funds, and *damage* by their abstraction. The Fidelity Bank could not have been the owner of the funds realized by the Chemical loan, nor damaged by the

embezzlement of those funds, unless it was legally bound to pay the loan.

In discussing Harper's fraudulent method of obtaining the ability personally to reap the benefit of the loan of $300,000 made to the Chemical Bank by the Fidelity Bank, counsel for appellant, in the course of describing it, say (p. 49): "The transfer of the funds to Harper was made in the regular mode of doing business. . . . This was no remarkable or unusual act of the vice-president of a bank." Then, after referring to the testimony of the witnesses as to the manner of making such transfers, they say again (p. 50): "There was nothing, therefore, unusual in this mode of transferring the funds." Then, after referring to some cases upon which we have already commented, they continue (p. 51): "The proceeds were placed to its credit by the Chemical; by transfer of funds the proceeds were credited to Harper and then checked out of the Chemical in the regular course of business; . . . It is true that the Chemical had no knowledge of the entries made on the Fidelity books nor of the frauds of Harper."

We have already called attention to the fact that the witnesses say that while the *form* by which Harper obtained the transfer of funds was regular, yet the *transaction* was obviously irregular upon his part; and while the clerks could properly obey him, yet by so doing they would not perform their whole duty; they should have gone farther, and have reported to another officer that Harper was thus taking credit without production of right to do so, and should have been particularly careful in examining the next account current from the bank against which Harper made the charge. With this comment upon what our opponents say as to the form of the transaction, we submit

that their concessions result in establishing the following propositions:

(1.) The transfer was the "regular mode" of doing such business. That is, the *form* of the act was correct, though the act itself is charged to be fraudulent.

(2.) The Chemical Bank had no control over the act, and no knowledge of it, nor of its fraudulent character.

(3.) It was "fraudulent," as between Harper and the Fidelity Bank, because it deprived the Fidelity Bank of property—money—which belonged to it.

(4.) The money belonging to the Fidelity Bank, because it had been loaned to that bank by the Chemical Bank.

(5.) Therefore there was an obligation to repay it.

(6.) "Damage" was caused by the fraud and the receiver elected to recover that damage, by the bill exhibited against the directors.

(7.) For all that appears in this record the payment by the directors has entirely indemnified the receiver.

(8.) If he has not been indemnified, and if the Fidelity Bank is still a loser by this transaction, and if we could separate the Fidelity, *as a bank*, from its fraudulent and negligent officers, and call it an *innocent* loser, then it is a case for the application of the rule, *that as between two innocent parties, where one of them must lose, that one shall bear the loss whose conduct has caused it, or has carelessly and negligently enabled its officers or agents to inflict the loss.*

It is stated on page 52 of our opponents' brief that if this loan had not been made by the Chemical Bank, Harper could not have obtained the money which he had credited to himself on the books of the Fidelity Bank. But counsel do not attempt to explain why he could not. There

is nothing in this record to lead one to suppose that Harper could not have done so; on the contrary, there is every reason to suppose that he could have done so. The credit to him was made upon his word only; and it stood upon his word, although when the account came in his word was given the lie. Clearly under any circumstances he could have obtained the credit in his own bank on his word merely, as he did obtain it, and beyond peradventure could have held it until the Chemical Bank's next account current came in. If his power extended thus far, who can say that he could not have covered his tracks in some other way so as to lull the bookkeeper to sleep when the account arrived.

Our opponents follow this assertion with another, that Harper would never have appropriated the money if the Chemical Bank had required a resolution of the board of directors to authorize the loan before making it. Here again we beg leave to say they are not speaking by the card. Either Baldwin, the cashier, was in league with Harper, or he was not. If he was not in league with him, then our opponents' case fails utterly, because of Baldwin's signature to the certificate of deposit, and the notice given to him by the letter sent by the Chemical Bank. If Baldwin was in league with Harper, then it can not be doubted that he would have manufactured copies of as many fictitious resolutions of the board of directors as circumstances required, and have attested them with the corporate seal; for with him as cashier rested the whole power of manufacturing the necessary evidence.

The final contention of our opponents, on pp. 52–53, illustrates the queer results that sometimes follow from driving the mind upon a path it is unwilling to pursue.

They claim to have convinced themselves that it makes no difference upon the merits of the case whether the persons guilty of actual negligence were the officers of the Chemical Bank or Harper's associates in the Fidelity Bank; and that in either case the Chemical Bank must stand the loss; they concede that in legal effect Harper's actions in the Fidelity Bank were not different from what they would have been had he reported to its board of directors that he had deposited to the credit of the Fidelity Bank $300,000 in the Chemical Bank, and wished them to give him the same amount from their own bank; and they, resting upon his word, had abstracted that amount of money in cash from the vaults of their bank and given it to him. That is to say, they contend that if an agent falsely tells his principal that he has established a credit for the principal with a third person, the principal may pay the supposed credit to the agent and recover it from the third person! The argument assumes that by some hocus pocus at Cincinnati, of which the Chemical Bank was and remained totally ignorant, the contract which it had made as it thought with the Fidelity Bank could be transferred so as to give that bank the full benefit of it but relieve it from all responsibility.

Surely rhetorical sophistry can not further go.

To conclude, the ultimate question presented by the case at bar is whether a principal, who acts only by agents, and who has been robbed by an agent, can throw his loss for that theft upon an innocent third party, and this, although that third party gave others of his agents information which, when coupled with knowledge they already had, advised them that such a theft had been committed, and although further the principal has, with full knowledge of the facts, compromised with his agents to his

satisfaction for the loss thus caused him. We submit that the correct answer to this question was given by the decree below, and that that decree should be affirmed.

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Counsel for Parties.

ALDRICH *v.* CHEMICAL NATIONAL BANK.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 58. Argued October 20, 1899. — Decided March 5, 1900.

H., as vice president of a Cincinnati bank, made application to a New York bank for a loan of $300,000. The request was granted and that amount was placed to the credit of the Cincinnati bank upon the books of the New York bank. Immediately thereafter H. fraudulently caused himself to be personally credited upon the books of his own bank with a like sum of $300,000. The action of H. in negotiating the above loan with the New York bank was unauthorized by the board of directors of the Cincinnati bank, but after the arrangement had been made that bank drew out by check the money that had been placed to its credit by the New York bank and used the same in discharging its valid obligations. *Held*, that by so using the money obtained from the New York bank by H. in his capacity of vice president, the Cincinnati bank became bound to account for the same as for money had and received, and could not escape liability to the New York bank upon the mere ground, supposing it to be true, that it was not permitted by its charter to borrow money. The fraud perpetrated by H. upon his own bank in having himself personally credited upon its books with the amount of the loan, was a matter with which the New York bank had no connection, and its right to recover could not be affected thereby. The liability of the Cincinnati bank rested upon the fact, and the implied obligation arising therefrom, that that bank used in its business and for its benefit the money which the other bank placed to its credit in consequence of the loan negotiated by H. who assumed to represent it.

There is nothing in the acts of Congress authorizing or permitting a national bank to appropriate and use the money or property of others without incurring liability for so doing.

This case and *Western National Bank* v. *Armstrong*, 152 U. S. 346, distinguished.

THE statement of the case will be found in the opinion of the court.

Mr. Francis F. Oldham and *Mr. John W. Herron* for appellant.

Mr. George H. Yeaman and *Mr. William Worthington* for appellee. *Mr. George C. Kobbé* was on their brief.

Opinion of the Court.

MR. JUSTICE HARLAN delivered the opinion of the court.

This litigation has extended over many years and the case as now presented will be best understood if a statement be made showing the proceedings in the Circuit Court and Circuit Court of Appeals.

In its bill in this case the Chemical National Bank alleged that on the 2d day of March, 1887, it loaned to the Fidelity National Bank the sum of $300,000 which the latter bank promised to repay on demand with interest from the date of the loan and at the same time delivered as collateral security therefor a certificate of deposit for the above amount together with sundry promissory notes.

The certificate referred to was in the following form: "Certificate of Deposit. This certificate is not subject to check, but must be presented to draw the money. No. 345. The Fidelity National Bank. Cincinnati, Feb. 28, 1887. E. L. Harper has deposited in this bank three hundred thousand dollars ($300,000), payable to the order of himself on return of this certificate in current funds. $300,000. Ammi Baldwin, Cashier. Indorsed: 'E. L. Harper.'"

It was alleged that the signature of Baldwin as cashier was used as the signature of the bank by its authority.

The bill then stated that on May 21, 1887, the Chemical Bank at the request of the Fidelity Bank returned some of the notes delivered as collateral security and received in substitution therefor other notes. The latter notes were described in a schedule attached to the bill, and it was alleged that the bank was still the owner and holder of them, except three executed by J. W. Wilshire for $25,000 each which had been paid at maturity by John V. Lewis, the indorser thereof, the money so paid being held in lieu of the notes delivered as collateral security for the loan.

After setting forth the appointment on the 21st day of June, 1887, of Armstrong as receiver of the Fidelity Bank as well as the subsequent proceedings by which on the 12th day of July, 1887, that corporation was dissolved, the bill alleged that the Fidelity Bank never repaid the loan nor any

part thereof; that the Chemical Bank presented to the receiver proof of its claim and requested him to submit it to the Comptroller of the Currency in order that a dividend might be paid to it from the assets of the bank equal in ratio to the dividends paid to other creditors, and that it might thereafter receive further dividends until its claim was paid; but that the Comptroller and the receiver had refused to allow it to be enrolled as a creditor.

The receiver without explicitly responding to the allegations of the bill as to the making of the loan said that he was unable to state whether or not the plaintiff loaned to the Fidelity Bank the sum of $300,000. In an amended answer he specifically denied that the Chemical Bank loaned to the Fidelity Bank the sum named, or that any such loan was made by the former to the latter on the faith and credit of the alleged certificate of deposit or that such certificate was executed and delivered by the cashier of the Fidelity Bank as its act and by its authority.

The answer averred that on the second day of March, 1887, and prior thereto Harper was the vice president of the Fidelity Bank and engaged in speculations in which he used its funds; that in the use of those funds he was assisted by Baldwin, but that such use was not known to the other directors of the bank, was not authorized by it, and was a fraudulent and illegal appropriation of its funds for the personal use of Harper; that a paper was signed by Baldwin, as cashier of the Fidelity Bank, which was believed to be the same paper alleged to be a certificate of deposit of the Fidelity Bank; that such certificate was not entered upon the books of the bank nor taken from the book from which, if regular, it should have been taken; that its execution was unknown to the other officers of the bank and was unauthorized by it; and that no consideration was received for it by the Fidelity Bank from Harper or from any other person nor was money deposited in the bank as the basis of the certificate.

Continuing, the defendant averred that the certificate of deposit and the promissory notes described in the bill were forwarded to the Chemical Bank by Harper, and the sum of

$300,000 was received by him from that bank; that he represented to the officers of the Fidelity Bank that the money was received from a loan made to him and by his direction was credited on his personal account, and was thereupon drawn out and used for his individual purposes, and that the other officers of the bank had no knowledge that the facts were otherwise than as represented by him. It was also averred that a large portion of the promissory notes delivered as collateral security for the loan were the personal property of Harper in which the Fidelity Bank had no interest.

The answer, after reciting the fact of the payment by the indorser Lewis of the three notes made by Wilshire for $25,000 each, alleged that the fourth note of Wilshire for the same amount, also indorsed by Lewis, was not presented for payment by plaintiff at maturity, in consequence whereof that note was not paid and the indorser was discharged. It was also averred that the Chemical Bank credited the payment of the above three sums of $25,000 upon the alleged loan of $300,000, reporting the same to the defendant as payments on that account, and treated them in all respects as proper credits on such loan. Payment of certain other notes since the bringing of the action was also alleged to have been made to the Chemical Bank.

The defendant therefore claimed that the Fidelity Bank was not liable to the Chemical Bank for the amount of the loan, but if it were otherwise adjudged, the defendant asked that all payments made to the plaintiff upon the collateral paper forwarded by Harper as security for the loan should be credited thereon; that the above note of Wilshire, indorsed by Lewis, not having been paid in consequence of plaintiff's neglect to present the same for payment, should be also credited; that the balance of the collateral paper should first be exhausted and the proceeds credited; and that the plaintiff should be permitted to prove only the amount found due after such credits had been made.

To the answer as amended the plaintiff filed a general replication.

In deciding the case the Circuit Court among other things

said: "Conceding that the transaction of the $300,000 loan was fraudulent as between E. L. Harper and the Fidelity Bank and that he appropriated the entire proceeds to his individual use, the claim of the Chemical Bank, which dealt in good faith in the transaction and was innocent of any knowledge or participation in the fraud, is not affected thereby. The negotiation of the loan was within the authority of Harper as vice president of the Fidelity Bank, and if he used that authority fraudulently for his own advantage, the bank that enabled him to commit the fraud must suffer from the consequences, and not the bank that made the loan and advanced the money, under the representation and in the belief that it was conducting a fair, legitimate business transaction with the Fidelity Bank." But the court held that all collections made prior to the filing of the claim upon the collaterals held by the Chemical Bank as security for the loan should be deducted therefrom. 50 Fed. Rep. 798, 802.

From this decision both parties appealed to the Circuit Court of Appeals. That court reversed the decree, holding upon an extended review by Judge Taft of the adjudged cases that creditors of an insolvent national bank could not be required *in proving their claims* to allow credit for any collections made after the declared insolvency of the bank from collateral securities held by them. 16 U. S. App. 465; 59 Fed. Rep. 372.

The Chemical Bank filed a petition for rehearing upon the ground that the court had erred in fixing the amount of interest to be allowed the bank on the dividends declared.

While that petition was under consideration by the Circuit Court of Appeals, this court decided the case of *Western National Bank* v. *Armstrong*, 152 U. S. 346, which related to a transaction between that bank and Harper. Thereupon the receiver filed a petition for rehearing, upon the question as to the validity of the loan involved in the present suit.

The above petitions for rehearing having been granted, the cause was again heard in the Circuit Court of Appeals and it was there decided that under the special facts disclosed by the evidence, and in view of the decision in *Western National Bank* v. *Armstrong*, the parties should be allowed an oppor-

tunity to introduce further evidence "upon the issue whether the Fidelity Bank owes anything to the Chemical Bank by virtue of the loan." The former order of the court was therefore modified, and the decree of the Circuit Court was reversed and the cause remanded, with leave to the parties to adduce such additional evidence. 31 U. S. App. 75, 83; 65 Fed. Rep. 573, 577.

The cause was again heard in the Circuit Court, which said: "Upon the evidence, the finding of this court is that the power of the Fidelity Bank to borrow money by conducting such a transaction as is involved in this case is established, and that the same is legitimately within the business of banking under the National Bank Act." It found for the Chemical Bank on the issue defined in the mandate of the appellate court. 76 Fed. Rep. 339, 345, 347. The decree was in these words: "And the court being now fully advised, finds that the Fidelity National Bank upon the second day of March, 1887, borrowed from the complainant the sum of $300,000, and that on the 21st day of June, 1887, when the Fidelity National Bank was declared insolvent, there was due from the Fidelity National Bank to the complainant the said sum of $305,450; that dividends have been declared from the assets of the Fidelity National Bank to the creditors thereof at the dates and for the rates per centum, as follows, that is to say: October 31, 1887, the first dividend of 25 per centum; June 15, 1889, the second dividend of 10 per centum; June 30, 1890, the third dividend of 10 per centum; August 5, 1891, the fourth dividend of 5 per centum; August 15, 1894, the fifth dividend of 8 per centum. The court further finds that upon the 25th day of April, 1890, the defendant rejected the claim aforesaid of the complainant, which had been theretofore presented to him; and that after the previous decree of this court upon, to wit, the 25th day of July, 1892, said defendant paid to said complainant the sum of $100,000 upon account of the sum which might be due to the complainant pursuant to the provisions for that purpose made in the decree of this court, entered in this cause on the 8th day of July, 1892. The court finds that there is now due this 21st day of October, 1896, to the complainant

from the defendant the sum of $117,749.78, being the dividends aggregating 58 per centum heretofore declared from the assets of the Fidelity National Bank, computed upon the amount of the complainant's claim as herein allowed, with interest on those of said dividends which were declared prior to April 25, 1890, from said last-named day, and with interest upon those thereafter declared from the dates of their declaration, respectively, after crediting the said payment of $100,000, upon the 25th day of July, 1892, the computation being made upon the principle ordinarily applied in partial payments. It is therefore ordered, adjudged and decreed that the defendant pay to the complainant the said sum of $117,749.78, with interest thereon from said 21st day of October, 1896, and that hereafter, while any balance remains due the complainant upon said loan, said defendant pay to complainant dividends, calculated upon said sum of $305,450, like to those paid to other creditors of the Fidelity National Bank."

The receiver appealed from this decree, and the Circuit Court of Appeals affirmed the decree of the court below. The opinion of that court states fully the grounds upon which it held the case not to come within the rule announced in *Western National Bank* v. *Armstrong*, 54 U. S. App. 462; 83 Fed. Rep. 556.

From that decree the receiver has appealed to this court — the present appellant having succeeded Armstrong.

The principal contention of the appellant is that under the principles announced in *Western National Bank* v. *Armstrong* the Fidelity National Bank incurred no liability on account of the money obtained from the Chemical National Bank. But the appellee insists that the language of this court in that case, so far as it relates to the power of a national bank as incidental to its business to borrow money was much broader than was necessary for the determination of the issues then before the court, and if interpreted as is done by the appellant is in conflict with the adjudged cases, inconsistent with sound principle, and should be modified.

In the last-named case the Western National Bank of New York alleged that the Fidelity Bank was indebted to

it on account of a loan made May 28, 1887, "at the special instance and request of E. L. Harper, who was then the vice president and general manager of the said Fidelity National Bank, with full authority to make said loan on its behalf," and which loan, it was further alleged, was secured by collateral, signed by one Gahr and indorsed by Harper, and by the indorsement and delivery to the Western Bank by Harper of certificates for 1600 shares of the capital stock of the Fidelity Bank. It was also alleged that the collateral was without value and that the stock was wholly invalid and void. The Fidelity Bank denied that the Western Bank made any loan to it, or that it had any connection with or interest in the transaction referred to in the bill. The pleadings and evidence raised the question whether Harper, in his transactions with the New York bank, could legally bind the Fidelity Bank of which he was vice president. This court said: "It may be conceded that the New York bank acted upon the theory that the loan was to the Ohio bank, and took the notes and certificates of stock as collateral. But the liability of the Ohio bank is not a necessary consequence of such a concession. It has further to be shown that the Ohio bank was really a party to the transaction, either by having authorized Harper to effect the loan on its behalf, or by having ratified his action and having accepted and enjoyed the proceeds of the discount. There is no evidence whatever that the board of directors of the Fidelity National Bank gave any authority to Harper to borrow money on behalf of the bank, much less to borrow so enormous a sum on so long a time. In this respect the complainant's case stands barely on the assertion in the bill that 'Harper was the vice president and general manager of the Fidelity National Bank, with full authority to make said loan on its behalf.' The only evidence we find in the record tending to support such averment is found in the answer by J. Harvey Waters, the general bookkeeper of the Fidelity National Bank, on cross-examination, wherein he stated that E. L. Harper was the vice president and managing officer, and that by 'managing officer' he meant that Harper was

the 'general manager of the business of the bank.' No such officer as that of 'general manager' is known or named in the National Bank Acts, nor does any such office exist by usage. The most that can be claimed in this case is that Harper acted as the principal executive officer of the bank. It cannot be pretended that, as such, he had power, without authority from the board, to bind the bank by borrowing $200,000 at four months' time. It might even be questioned whether such a transaction would be within the power of the board of directors. The powers expressly granted are stated in the eighth section of the National Bank Act (Rev. Stat. § 5136, par. 7): A national bank can 'exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes.' The power to borrow money or to give notes is not expressly given by the act. The business of the bank is to lend, not to borrow; to discount the notes of others, not to get its own notes discounted. Still, as was said by this court in the case of *First Nat. Bank of Charlotte* v. *Exchange Nat. Bank of Baltimore*, 92 U. S. 122, 127, 'authority is thus given in the act to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted.' These powers are such as are required to meet all legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others. Nor do we doubt that a bank, in certain circumstances, may become a temporary borrower of money. Yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting

for the bank had special authority to borrow money. Even, therefore, if it be conceded that it was within the power of the board of directors of the Fidelity National Bank to borrow $200,000 on time, it is yet obvious that the vice president, however general his powers, could not exercise such a power unless specially anthorized so to do, and it is equally obvious that persons dealing with the bank are presumed to know the extent of the general powers of the officers. Without pursuing this part of the subject further, we think it evident that Harper had no authority to borrow this money, and that the bank cannot be held for his engagements, even if made in behalf of the bank, unless ratification on the part of the bank be shown."

In the view we take of the present case it is not necessary to extend this opinion by a review of the numerous authorities which, it is contended, support the general proposition that a national bank is entitled under the law of its creation and in the conduct of its business to borrow money, and that the lender is not obliged to show that the officer or agent acting for the bank had special authority to negotiate the loan. If the present case depended upon that question it might be necessary to consider whether the language in *Western National Bank* v. *Armstrong* required modification.

It may be well, however, to observe that this court in *Auten* v. *United States Bank of N. Y.*, 174 U. S. 125, 141, 143, held that the borrowing of money was not out of the usual course of banking business. We said: "A power so useful cannot be said to be illegitimate, and declared as matter of law to be out of the usual course of business and to charge everybody connected with it with knowledge that it may be in excess of authority. It would seem, if doubtful at all, more like a question of fact, to be resolved in the particular case by the usage of the parties or the usage of communities." It is important also to observe that the court said that *Western National Bank* v. *Armstrong* was not to be regarded as an adjudication to the contrary.

We may further observe that the last-named case differs from the present case in many important particulars.

In *Western National Bank* v. *Armstrong* the defendant bank did not receive or get the benefit of the money alleged to have been loaned to it at the instance of its vice president. This court took care in that case to say that it did "not appear that the bank ever got a penny of the borrowed money or any benefit or advantage whatever by reason of the transaction."

In the present case it appears that the following letter, under date of February 28, 1887, and signed by E. L. Harper as vice president of the Fidelity Bank, was addressed to the cashier of the Chemical Bank: "Enclosed herewith we hand you for credit our certificate of deposit No. 345 for $300,000, with bills as collateral, as follows: [Here was given a list of twenty-seven notes]. We desire to keep a large reserve with you, and we trust you will make the rate as low as you proposed some time since. Please place the amount to our credit and advise the rate." This letter having been received by the Chemical Bank, its cashier wrote to the cashier of the Fidelity Bank under date of March 2, 1887: "Your favor of the 28th inst. has been received. We credit Fidelity National Bank $300,000, and shall be considerate as to the rate of interest when the loan is paid." Before this last letter could have reached Cincinnati the bookkeeper of the Fidelity Bank, acting under instructions from Harper, credited him personally on the books of that bank with $300,000. But the credit of $300,000 given to the Fidelity Bank on the books of the Chemical Bank remained unaltered, and that amount was drawn from the latter bank in the ordinary course of business on the authorized checks of the Fidelity Bank and went to discharge its legal obligations. And it may be added that the Fidelity Bank had notice of the above credit in its favor; for besides other evidence, it was shown that in the monthly statement sent by the Chemical Bank to the Fidelity Bank covering the transactions of March, 1887, there appeared under the date of March 2d a credit to the Fidelity Bank as follows: "Tem. loan, $300,000."

We have then a case in which a national bank having used in its business money which its vice president obtained as a loan to it from another national bank denies all liability to

account for the same upon the ground that the loan was not negotiated by it or by its direction, as well as upon the ground that it could not itself have legally borrowed the money from the other bank. Do the statutes relating to national banking associations require that such a defence be sustained? This question is recognized by the court as one of great importance, and has received careful consideration in the light of the adjudged cases. We proceed to the examination of those cases.

In *Merchants' Bank* v. *State Bank*, 10 Wall. 604, 644, in which one of the questions was as to the liability of a bank on account of certain certificates issued by its cashier and of certain purchases of gold made by him, the court said that if the certificates and the gold actually went into the bank which the cashier assumed to represent, then the bank was liable for money had and received, whatever may have been the defect in the authority of the cashier to make the purchase.

In *Marsh* v. *Fulton County*, 10 Wall. 676, 684, it was held that "the obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independently of any statute, will compel restitution or compensation."

In *United States* v. *State Bank*, 96 U. S. 30, 36, which were actions brought in the Court of Claims against the United States to recover the amount of certain gold certificates deposited in the subtreasury at Boston and forwarded, after being cancelled, to the Treasurer of the United States, and in which transactions fraud was imputed to the cashier of the subtreasury at Boston, this court said: "In these cases, and many others that might be cited, the rules of law applicable to individuals were applied to the United States. Here the basis of the liability insisted upon is an implied contract by which they might well become bound in virtue of their corporate character. Their sovereignty is in nowise involved. . . . Surely it ought to require neither argument nor authority to support the proposition that, where the money or property of an innocent person has gone into the coffers of the

nation by means of a fraud to which its agent was a party, such money or property cannot be held by the United States against the claim of the wronged or injured party. The agent was agent for no such purpose. His doings were vitiated by the underlying dishonesty, and could confer no rights upon his principal."

The rule was illustrated in *Louisiana* v. *Wood*, 102 U. S. 294, which was an action against a municipal corporation to compel it to repay money received and paid into its treasury on account of bonds sold by it but which it had issued without authority of law. This court held that the law implied from what was done a contract that the city would return the money paid to it by mistake. To the same effect is *Chapman* v. *Douglas County*, 107 U. S. 348, 355 *et seq.*

In *Parkersburg* v. *Brown*, 106 U. S. 487, 503, it appeared that the city of Parkersburg, West Virginia, pursuant to an act of the legislature of that State, issued its bonds to be loaned to persons engaged in manufacturing and to be secured by deed of trust or mortgage on real estate. The bonds were held to be void under the principles announced in *Loan Association* v. *Topeka*, 20 Wall. 655, and the question arose whether the city was bound to account for the property conveyed to it in trust to secure bonds so issued and loaned to persons engaged in manufacturing. This court said: "Notwithstanding the invalidity of the bonds and of the trust, the O'Briens had a right to reclaim the property and to call on the city to account for it. The enforcement of such right is not in affirmance of the illegal contract, but is in disaffirmance of it, and seeks to prevent the city from retaining the benefit which it has derived from the unlawful act. 2 Com. Cont. 109. There was no illegality in the mere putting of the property in the hands of the city. To deny a remedy to reclaim it is to give effect to the illegal contract. The illegality of that claim does not arise from any moral turpitude. The property was transferred under a contract which was merely *malum prohibitum*, and where the city was the principal offender. In such a case the party receiving may be made to refund to the person from whom it has received

property for the unauthorized purpose, the value of that which it has actually received. *White* v. *Franklin Bank*, 22 Pick. (Mass.) 181; *Morville* v. *American Tract Society*, 123 Mass. 129; *Davis* v. *Old Colony Railroad*, 131 Mass. 258, 275, and cases there cited."

In *Read* v. *Plattsmouth*, 107 U. S. 568, 575, where the question was as to the validity of bonds issued by a municipal corporation, the court said: "In the present case the statute in question does not impose upon the city of Plattsmouth, by an arbitrary act, a burden without consent and consideration. On the contrary, upon the supposition that the bonds issued, as to the excess over $15,000, were void, because unauthorized, the city of Plattsmouth received the money of the plaintiff in error, and applied it to the purpose intended, of building a schoolhouse on property the title to which is confirmed to it by the very statute now claimed to be unconstitutional, and an obligation to restore the value thus received, kept and used immediately arose."

A case aptly illustrating the principle adverted to is *Logan County Bank* v. *Townsend*, 139 U. S. 67, 74, 78. The facts in that case were these: Townsend, it was alleged, sold to the Logan County National Bank, through its cashier, bonds of a railroad corporation in consideration of a named sum and the agreement of the bank that it would, upon his demand, replace the bonds to him at the same price or less. The bank refused to comply with the agreement to replace the bonds, and Townsend sued to recover from it the damages sustained by him, to wit, the difference between the price paid by the bank and the value of the bonds. The bank, in its defence, denied that it had any connection with the transaction between Townsend and its cashier otherwise than that the latter having deposited the proceeds in the bank it had paid them to the plaintiff. Its principal defence was that the cashier as such had no authority to make the contract set out, and that the defendant had itself no right, power or authority to make it. Taking it to be true, as found by the jury, that the alleged agreement was made by the cashier for the bank and not upon his individual account, and assuming from the record

that the bank held the bonds at the time Townsend sued, this court said: "If it be assumed, in accordance with the bank's contention, that it was without power to purchase these bonds, to be replaced to the plaintiff on demand, the question would still remain whether, notwithstanding the act of Congress defining and limiting its powers, it was exempt from liability to the plaintiff for the value of the bonds, if it refused, upon demand, to replace or surrender them at the same or a less price. It would seem, upon defendant's theory of its powers, to be too clear to admit of dispute that the act of Congress does not give a national bank an absolute right to retain bonds coming into its possession by purchase under a contract which it was without authority to make. True it is not under a duty to surrender possession until reimbursed the full amount due it; it has the right to hold the bonds as security for the return of the consideration paid for them; but when such amount is returned, or tendered back to it, and the surrender of the bonds is demanded, its authority to retain them no longer exists. And from the time of such demand and its refusal to return the bonds to the vendor or owner, it becomes liable for their value upon grounds apart from the contract under which it obtained them. It could not rightfully hold them under or by virtue of the contract, and at the same time refuse to comply with the terms of purchase. If the bank's want of power under the statute to make such a contract of purchase may be pleaded in bar of all claims against it based upon the contract — and we are assuming, for the purposes of this case, that it may be — it is bound upon demand, accompanied by a tender of the price paid, to surrender the bonds to its vendor. The bank, in this case, insisting that it obtained the bonds of the plaintiff in violation of the act of Congress, is bound, upon being made whole, to return them to him. No exemption or immunity from this principle of right and duty is given by the national banking act." Again: "Our conclusion upon the whole case, so far as the questions arising in it may be reviewed by this court, is, that if the bank had no authority to purchase the bonds in question, it is yet not exempt, by reason of anything

in the national banking act, from liability to the plaintiff for the difference between the price it paid for them and their value at the time it refused, upon plaintiff's demand, to comply with the contract made by it for their purchase and held on to the bonds."

In *Central Transportation Company* v. *Pullman's Car Company*, 139 U. S. 24, 60, which involved the validity of a certain contract whereby one corporation leased and transferred all its cars, contract rights and personal property to another corporation, and which lease was held to be void, this court said: "A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract." This principle was recognized and enforced in *Pullman's Car Company* v. *Transportation Company*, 171 U. S. 138, 151, in which it was said: "The right to a recovery of the property transferred under an illegal contract is founded upon the implied promise to return or make compensation for it."

In *Dittey* v. *Dominion National Bank of Bristol*, 43 U. S. App. 613, 615, which was an action against a receiver of a national bank to recover the amount of a loan made by its president without the knowledge of the directors and for which he gave the note of the bank — the object of the transaction being to cover up certain frauds of the president — the court, speaking by Judge Taft, said: "In our opinion, even if the president may not have had authority to effect the loan, yet when he, in order to conceal his previous embezzlement,

deposited the sum to the credit of the Citizens' Bank with its reserve agent in New York, and it was checked out for the benefit of the bank, the bank and its board of directors were affected with the knowledge which Overman as its president had of the receipt of the moneys. Having received the benefit through an agent, it is affected with the burden of the notice which that agent had of its reception, and therefore it became liable for money had and received to its use from the Dominion Bank. We think the same principle applicable in this case which was applied in the case of *Atlantic Cotton Mills* v. *Indian Orchard Mills*, 147 Mass. 268. In that case the treasurer of two corporations was a defaulter in both positions. The defalcations were of long standing, and to avoid discovery at the annual settlement of one company he drew checks of the other and deposited them to the credit of the one company in the bank. The question was whether the company whose bank account had been swelled by the checks of the other was a debtor to the other for the deposits thus made by the common treasurer. It was held that the company receiving the money, having received it through the sole agency of the man who knew it to be stolen, could only take and hold it with the burden of his knowledge. So in this case the bank, having received the money through the agency of its president, could not retain it without assuming the burden of the president's knowledge as to how it came to be obtained. We do not see that the circumstance in one case that the treasurer stole the money and in the other that the president obtained it on the false representation that he was authorized to borrow it for his bank makes any reasonable distinction between the two cases."

In *Perkins* v. *Boothby*, 71 Maine, 91, 97, the question was as to the liability of a joint stock company on account of notes given by its agent for money loaned and which was appropriated to the payment of the company's debts. The directors had no knowledge of the loan or the appropriation of the money, unless knowledge could be implied from the fact that those acts were done by the agent. The defence was that the agent's want of authority to effect the loan relieved the com-

pany from responsibility not only on the notes but for any claim under the common counts for money had and received. After observing that although the directors upon receiving notice of the acts of the agent in terms repudiated them, yet after knowledge of the facts retained the benefit of the loans effected and used the money in discharge of valid claims against the company which would have been in force except for the unauthorized acts of the agent, the court said: "'If liable in one case why should not a corporation be always liable to refund the money or property of a person which it has obtained improperly and without consideration, or if unable to return it, to pay for the benefit obtained thereby? To say that a corporation cannot sue or be sued upon an *ultra vires* arrangement is one thing. To say that it may retain the proceeds thereof which have come into its possession without making any compensation whatever to the person from whom it has obtained them, is something very different, and savors very much of an inducement to fraud.' Green's Brice's Ultra Vires, 618. The question whether upon reason and authority the application of this principle should be extended to municipal corporations, or whether, on the contrary, the purposes for which such bodies are organized, the limited powers conferred upon them, as well as considerations of public policy and safety, may remove them from such liability, is one of great importance. It does not arise in this case."

In *Bank of Lakin* v. *National Bank*, 57 Kansas, 183, a bank was held liable for the amount of certain notes executed in its name by its cashier without its authority, but the proceeds of which were received by the bank, the court saying that "a principal cannot receive the benefits of a transaction and at the same time deny the authority of the agent by whom it was consummated."

Without further citation of cases we adjudge, both upon principle and authority, that as the money of the Chemical Bank was obtained under a loan negotiated by the vice president of the Fidelity Bank who assumed to represent it in the transaction, and as the Fidelity Bank used the money so obtained in its banking business and for its own benefit, the

latter bank having enjoyed the fruits of the transaction cannot avoid accountability to the New York bank, even if it were true as contended that the Fidelity Bank could not consistently with the law of its creation have itself borrowed the money. When, as the result of its arrangement with Harper as vice president, the Chemical Bank credited the Fidelity Bank on its books with the sum of $300,000 the former thereby undertook to pay the checks of the latter to the extent of that credit. And, as already stated, that credit was fully exhausted by the payment of the checks of the Fidelity Bank drawn in the ordinary course of its business. If the latter bank in this way used the money obtained from the Chemical Bank, it is under an implied obligation to pay it back or account for it to the New York bank. It cannot escape liability on the ground merely that it was not permitted by its charter to obtain money from another bank. Suppose the Fidelity Bank by its check upon the Chemical Bank had drawn the whole $300,000 at one time and now had the money in its possession unused? It would not be allowed to hold the money even if it were without power under its charter to have borrowed it from the Chemical Bank for use in its business. Or suppose a national bank, in violation of the act of Congress, takes as security for a loan made by it a deed of trust of real estate, and subsequently causes the property to be sold and the proceeds applied in payment of its claim against the borrower, a surplus being left in its hands, which it uses in its business or in discharge of its obligations. If sued by the borrower for the amount of such surplus, could the bank successfully resist payment upon the ground that the statute forbade it to make a loan of money on real estate security? Common honesty requires this question to be answered in the negative. But it could not be so answered if it be true that the Fidelity Bank could use in its business and for its benefit money obtained by one of its officers from another bank under the pretence of a loan, and be discharged from liability therefor upon the ground that it could not itself have directly borrowed from the other bank the money so obtained and used. There is nothing in the acts of Congress authorizing or permitting a national bank to appro-

priate and use the money or property of others for its benefit without liability for so doing. If the Fidelity Bank did not itself borrow this money from the Chemical Bank, although the latter bank in good faith believed that it did, then the crediting of the former on the books of the latter with $300,000 was a mistake of which the Fidelity Bank was not entitled in equity and good conscience to take advantage and from which it should not be permitted to derive profit to the prejudice of the other bank. So if the Fidelity Bank took the benefit of that credit with knowledge of all the facts, then its defence is without excuse and immoral. If it innocently availed itself of that credit without knowledge of the facts, the principles of natural justice demand that it be held accountable for the money of another bank which it used in its business without giving any consideration therefor.

The fact that after the Fidelity Bank had been credited on the books of the Chemical Bank with the $300,000, Harper fraudulently caused himself to be credited on the books of the Fidelity Bank with a like sum, is a matter with which the Chemical Bank had no connection and cannot affect its right to demand a return of the money which went (as the Chemical Bank in good faith supposed it would) into the treasury of the Fidelity Bank and was by it used in meeting its current obligations. The dishonesty of Harper in his management of the affairs of the Fidelity Bank did not discharge that bank from the obligation under which it came by using in its business the money obtained by its vice president under the guise of a loan to the bank.

It is no defence to the claim of the Chemical Bank to say that the directors of the Fidelity Bank were unaware of the fraudulent acts of Harper. We do not rest our conclusion in the present case upon any question as to diligence or want of diligence upon the part of directors. We rest it upon the fact and the implied obligation arising therefrom that the Fidelity Bank used in its business and for its benefit the money which the Chemical Bank placed to its credit in consequence of a loan negotiated by Harper, who assumed to represent it.

Independently therefore of any question as to the scope of the power of a national bank to borrow money to be used in its business, we hold that the Fidelity Bank became liable to the Chemical Bank by using the money obtained from the latter, under the arrangement made by Harper in his capacity as vice president; consequently, the decree recognizing the claim, of the Chemical Bank for the amount of the loan of March, 1887, was right.

2. It is assigned for error that the collections from collaterals securing the alleged loan prior to the declaration of dividends by the receiver were not deducted from the amount of such loan in determining the sum upon which dividends should be paid to the Chemical Bank, and that the Chemical Bank was not required first to exhaust its collateral security and apply the proceeds on its claim before proving it against the receiver for dividends.

This assignment of error was prepared by counsel prior to the decision of this court in *Merrill* v. *National Bank of Jacksonville*, 173 U. S. 131, 135, 146, 147, in which case this court said that the inquiry on the merits was whether a secured creditor of an insolvent national bank may prove and receive dividends upon the face of his claim as it stood at the time of the declaration of insolvency, without crediting either his collaterals or collections made therefrom after such declaration, subject always to the proviso that dividends must cease when from them and from collaterals realized the claim has been paid in full. It was held that in the distribution of insolvent estates, "the secured creditor is a creditor to the full amount due him when the insolvency is declared, just as much as the unsecured creditor is, and cannot be subjected to a different rule. And as the basis on which all creditors are to draw dividends is the amount of their claims at the time of the declaration of insolvency, it necessarily results, for the purpose of fixing that basis, that it is immaterial what collateral any particular creditor may have. The secured creditor cannot be charged with the estimated value of the collateral, or be compelled to exhaust it before enforcing his direct remedies against the debtor, or to surrender it as a condition thereto,

though the receiver may redeem or be subrogated as circumstances may require." "When secured creditors have received payment in full, their right to dividends and their right to retain their securities cease, but collections therefrom are not otherwise material. Insolvency gives unsecured creditors no greater rights than they had before, though through redemption or subrogation or the realization of a surplus they may be benefited."

3. It is also insisted that the Chemical Bank should have been required to deduct from its claim the amount, principal and interest, of the note for $25,000 indorsed by J. V. Lewis, who, it is alleged, was released because of its failure to take the steps required by the rules of commercial law in order to charge him as indorser. Upon this point the Circuit Court of Appeals, upon the first hearing of this case, said: "Our conclusion upon this main question in the case makes it unnecessary for us to consider the other questions discussed by counsel, which were material only in view of the position taken by the court below on the issue just considered. If the Chemical Bank should receive from dividends and collections payment of debt, principal and interest, now owing to it by the Fidelity Bank, the question would arise whether it could not properly be charged with the note for $25,000 which, through negligence, it failed to collect. It is quite clear, however, that dividends declared and to be declared, together with all collections from collaterals, including as such the note just referred to, will fall far short of paying the $300,000 and interest due the Chemical Bank on the original debt. The question suggested, therefore, does not arise on the facts of the case." 16 U. S. App. 465, 539; 59 Fed. Rep. 372, 382. We concur in that view.

Having noticed all the questions that require consideration, the decree below is

Affirmed.